



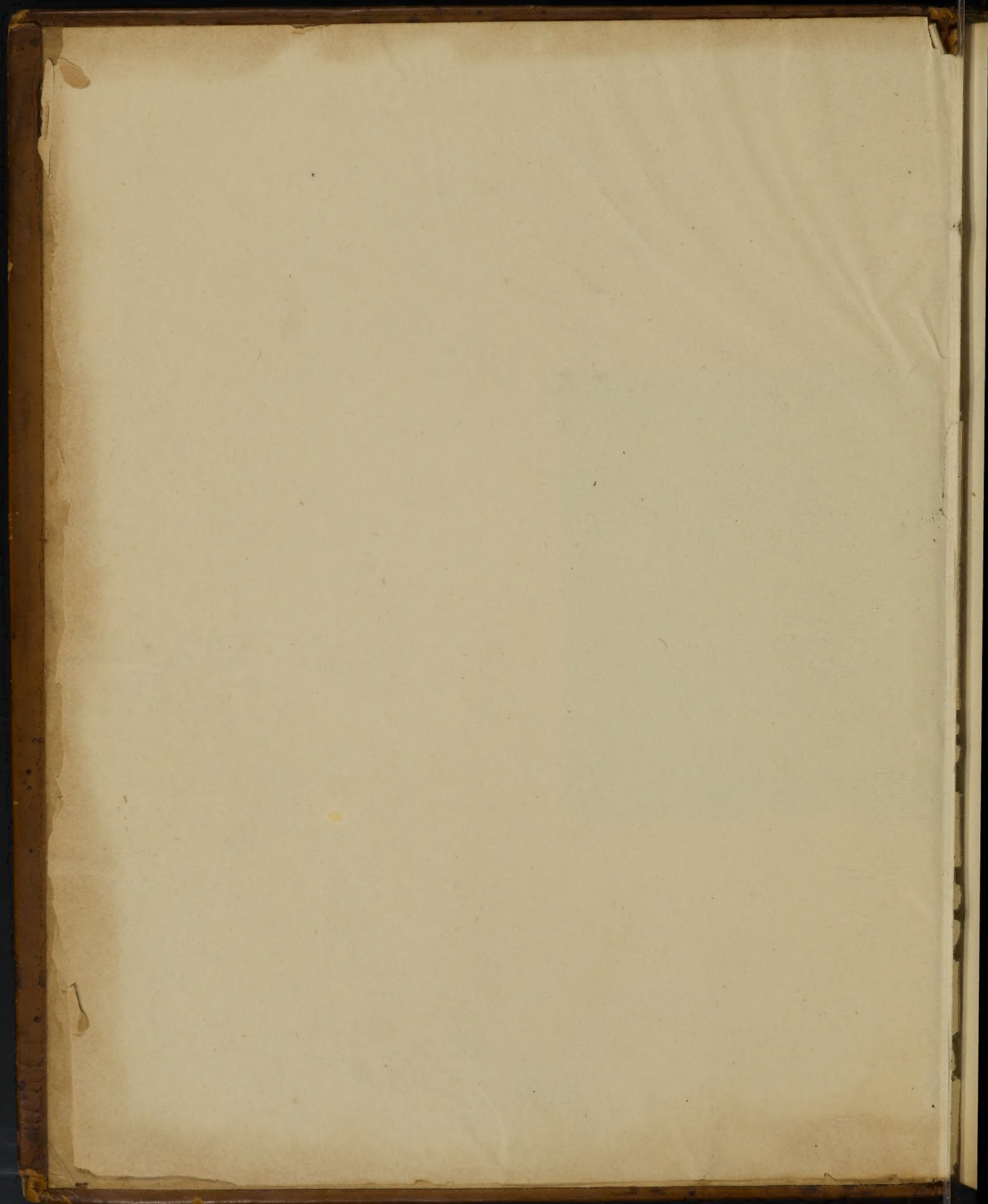
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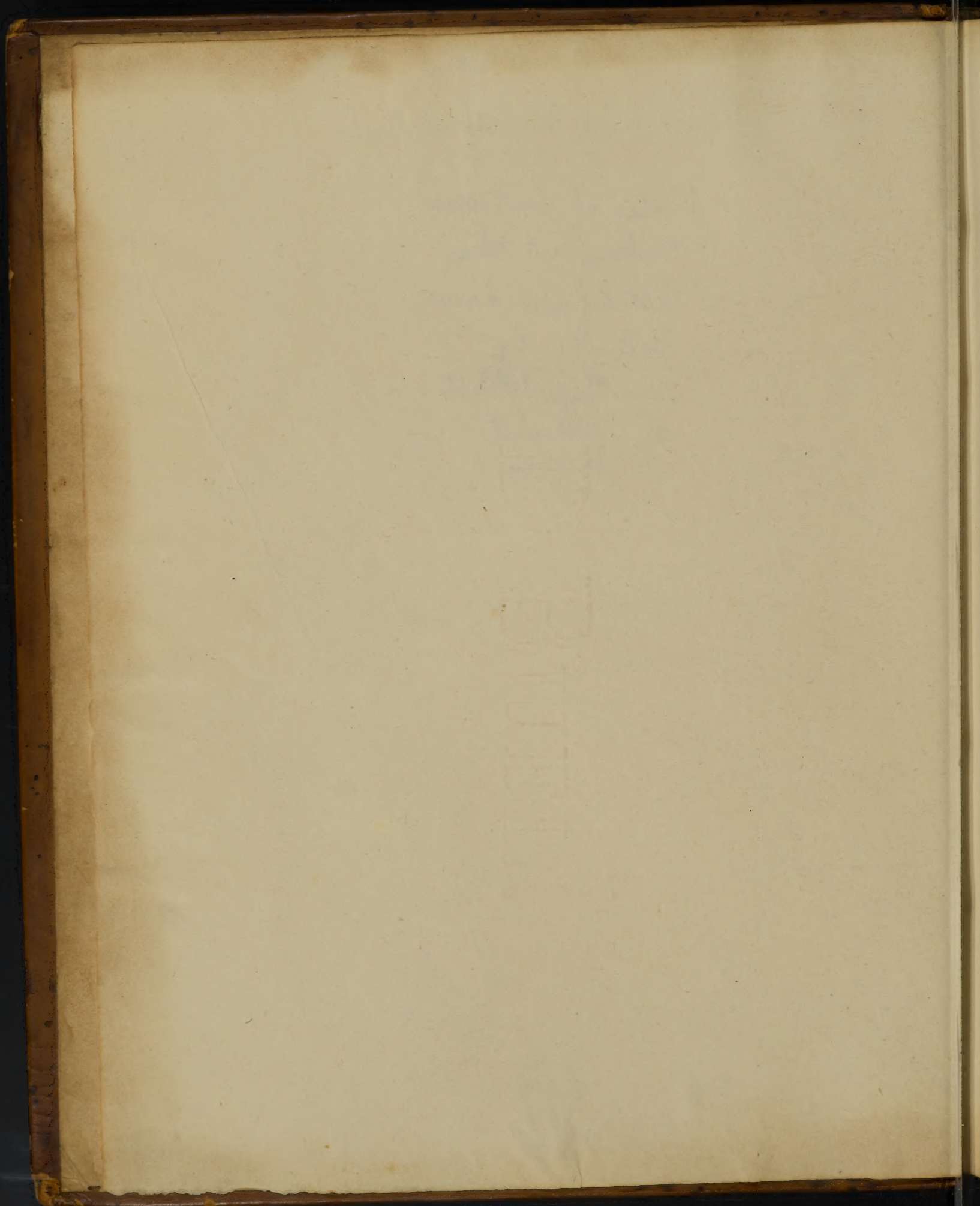
Reeve's and Gould's Lectures

Notes of Lectures  
taken at the  
Litchfield Law  
School by  
Timothy Follett  
of Vermont.

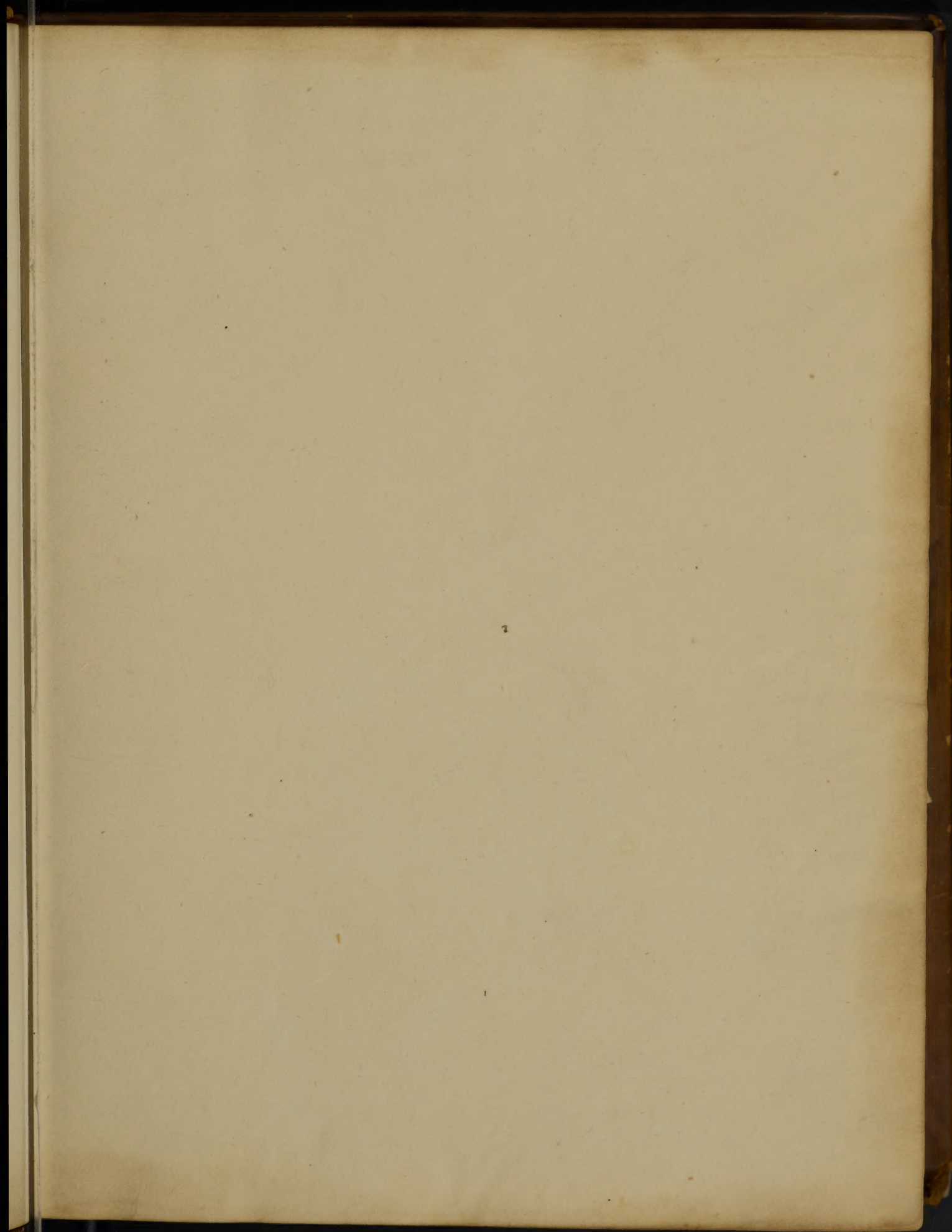
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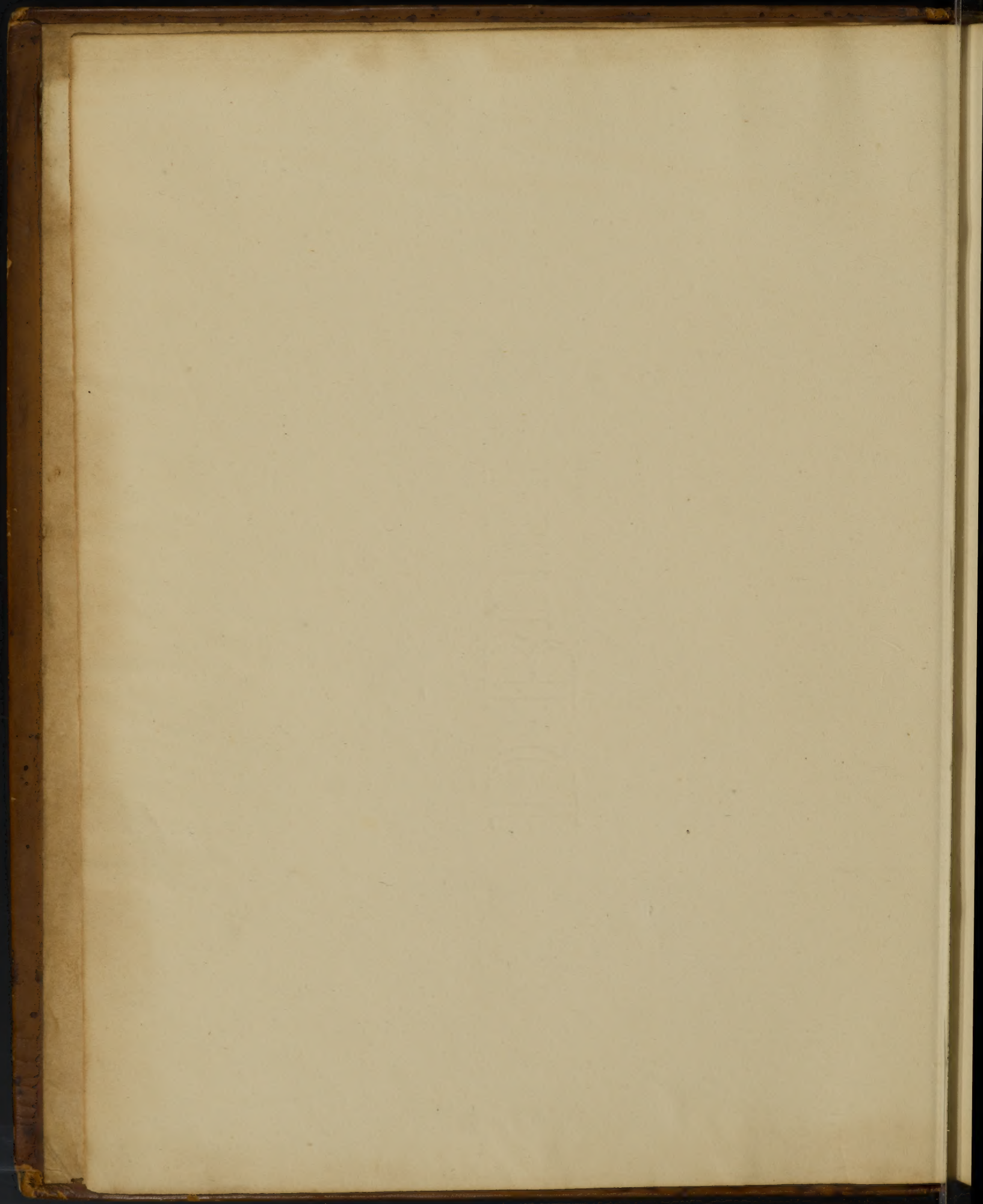




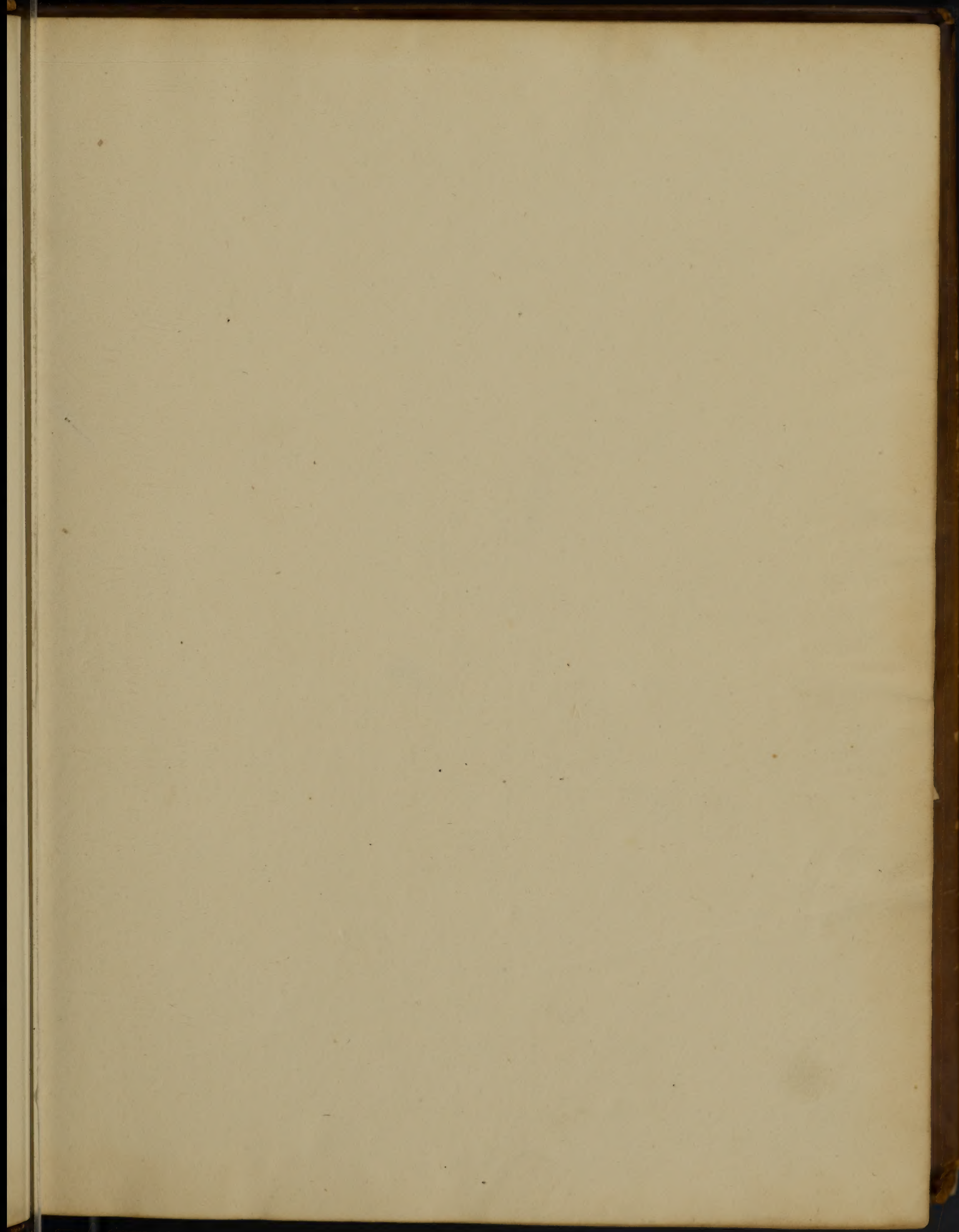




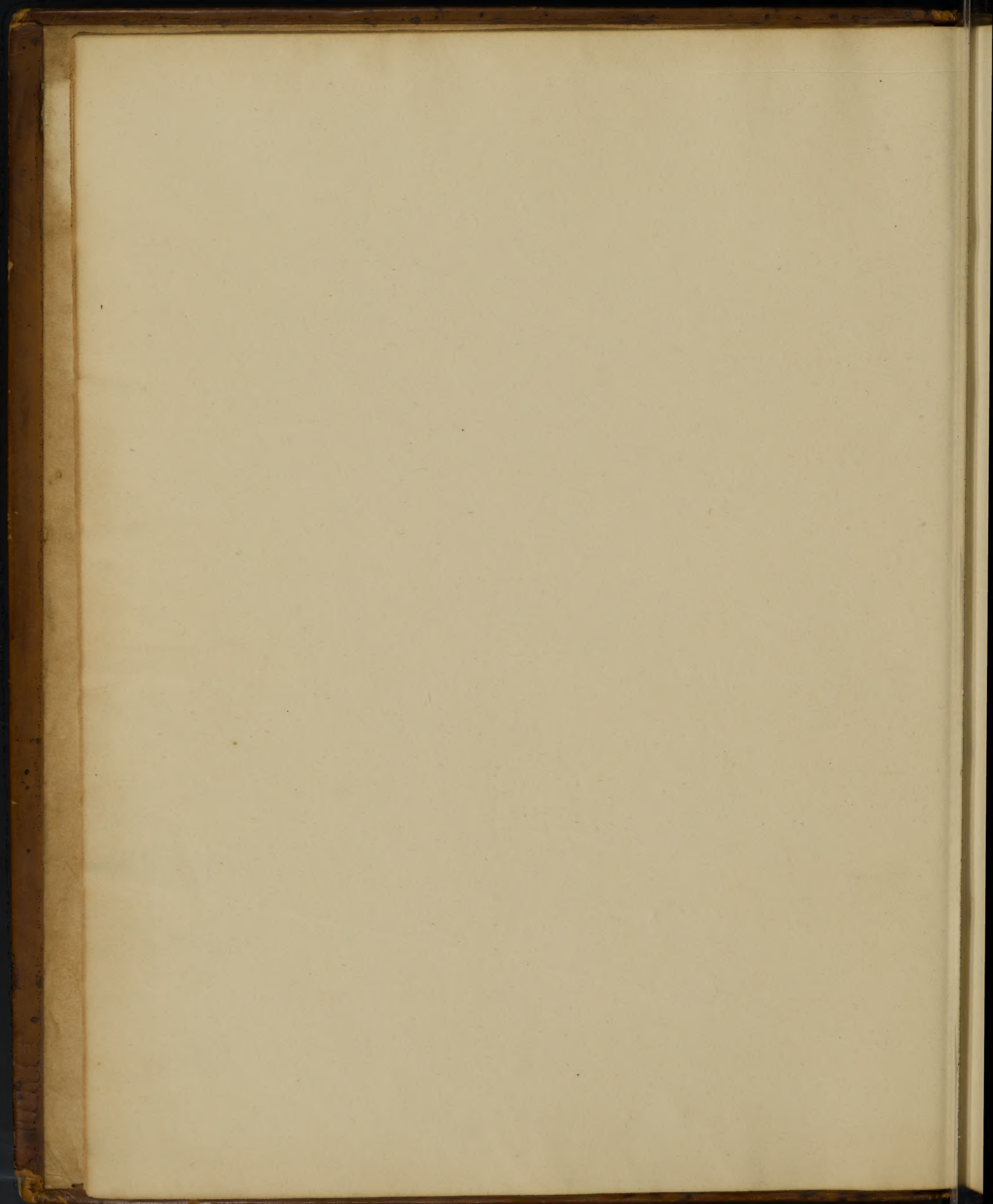




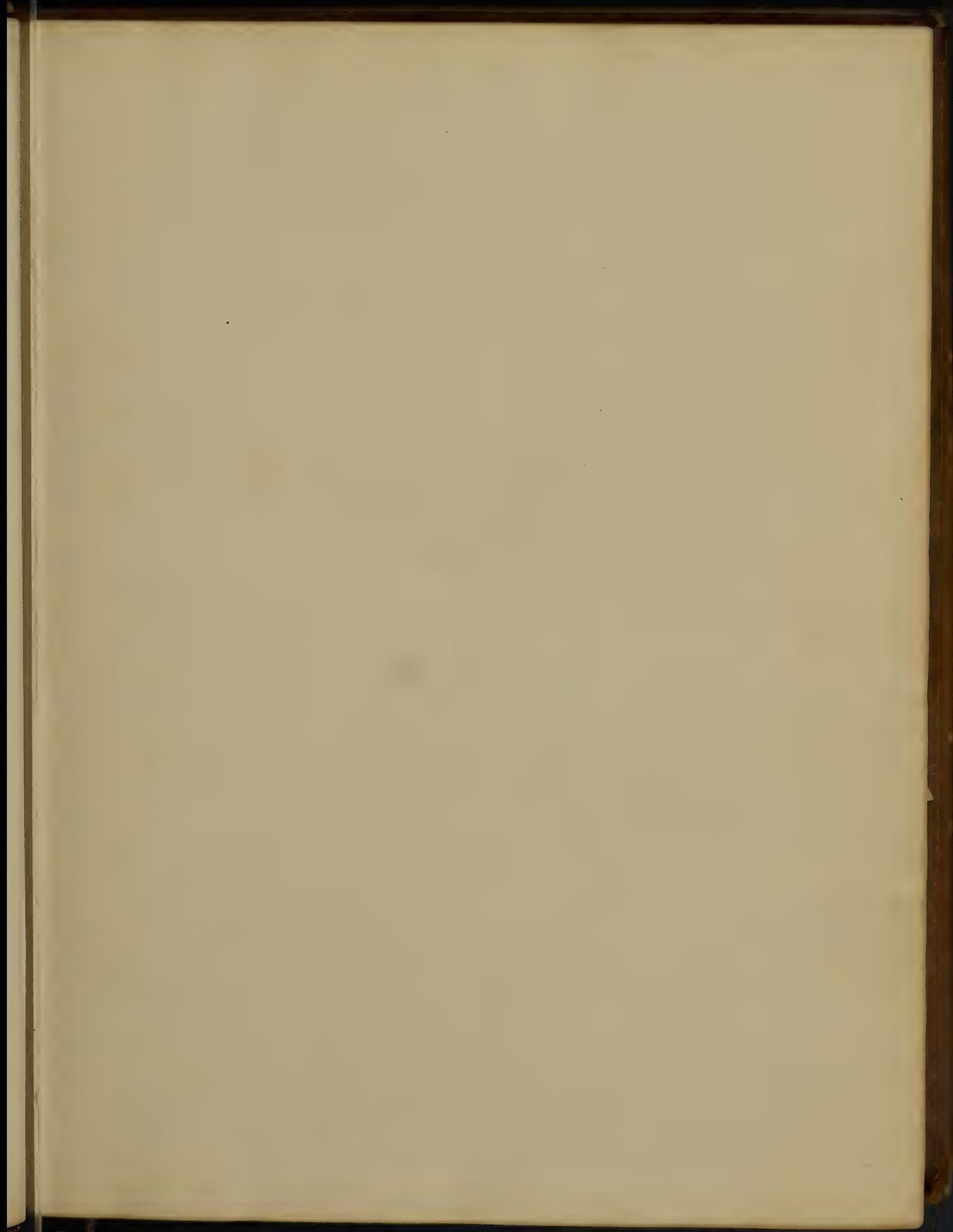




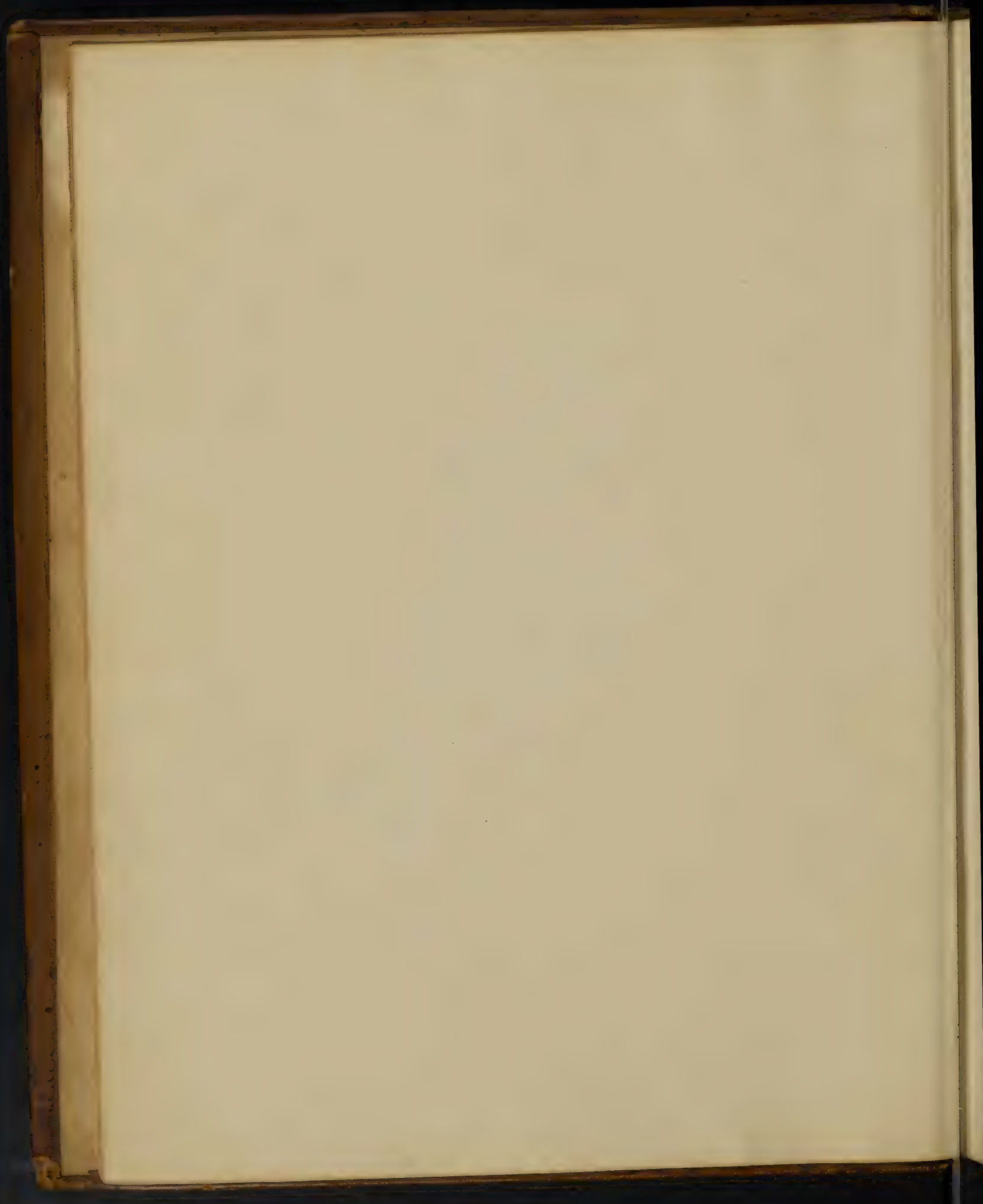


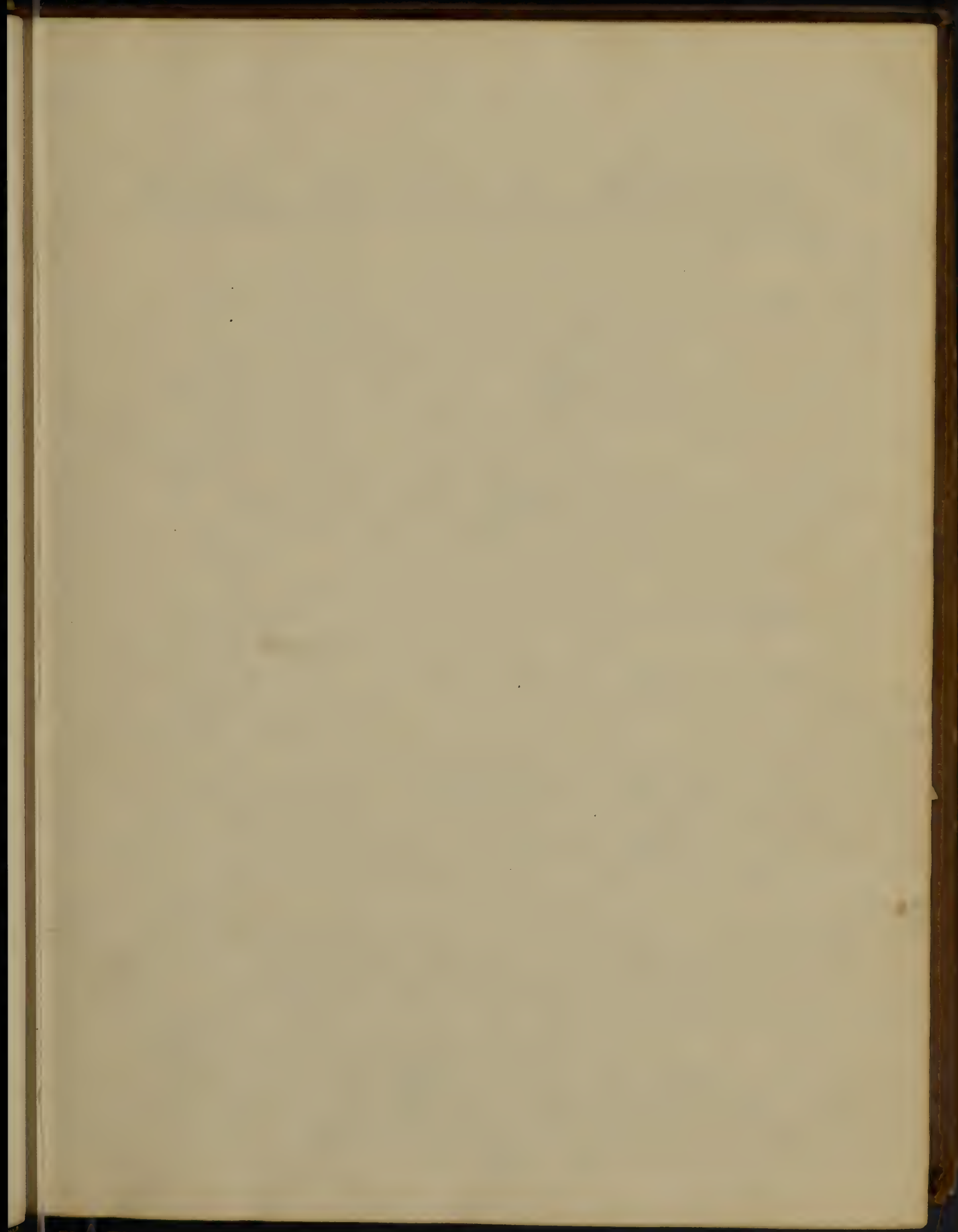














34-513

# Of the Rights of Persons.

By M. Gault.

The subject matter of Municipal Law is divided into two general kinds,

Rights and Wrongs. Its object is to guard & enforce the former; & to prevent or redress the latter. 1 Bl. 122. 3 Bl. 1.

It is necessary that Rights be first understood - as Wrongs are but privations or violations of right. 3 Bl. 2.

Rights are of Two kinds - 1. of Persons  
2. of Things.

Wrongs are of Two kinds - Private and Public. 1 Bl. 122.

Persons as contemplated by Municipal Law are of Two kinds - Natural - Artificial.

1<sup>st</sup> Natural are human beings considered in their natural capacities; i.e. as framed by God of Nature.

2<sup>d</sup> Artificial are such as are created by the Law, & are called Corporations or Bodies Politic. as Cities - corporate towns or societies, & other incorporated companies. 1 Bl. 123. 467.

These derive their existence from the act or charter of incorporation. They are created to maintain a perpetual succession for the purpose of



perpetuating certain particular rights. 1 Bl. 467.

Of the rights of Persons considered in their natural capacity. There are of Two kinds

Absolute and Relative.

1. Absolute, are such as belong to individuals considered as individuals - such as belong to them even in a state of nature. These constitute what is called natural liberty. So far as their enjoyment is consistent with the preservation & welfare of civil society, they are enforced by the municipal law. 1 Bl. 123. 5.

It is obvious then that absolute rights cannot appertain to artificial persons - since they derive even their existence & of course all their rights from the institutions of civil society.

The absolute rights of Persons comprehend the right of personal security - personal liberty - and private property. 1 Bl. 129.

The absolute rights of persons & the principles of law, which relate to them, being few & simple, I shall treat of them very briefly, giving only an outline of the Law on the subject, & refer to Blackstone & to the head of Wrongs for a more particular discussion of it. 1 Bl. 124. 5. & 134.

1<sup>st</sup> The right of personal security consists in the right of enjoying our life, limbs, body, health, and reputation. 1 Bl. 129.

2<sup>d</sup> Personal liberty as here used consists in the

power of loco motion - i.e. of removing one's person from place to place, without restraint except by due course of law. The right of personal liberty consists, then, in the right of loco motion &c. 1 BL. 134.

3<sup>d</sup> The right of private property, is the right of using, enjoying & disposing of one's acquisitions, without control, except by the laws of the land. 1 BL. 138.

The right of private property is founded on natural law - its modifications as the tenure by which it is holden, & the method of preserving & transferring it, are derived from society. 1 BL. 138. 2 BL. 3.8.

II. The Relative rights of persons are those, which grow out of the relations of civil society or such as belong to individuals considered as members of civil society. 1 BL. 123. 146.

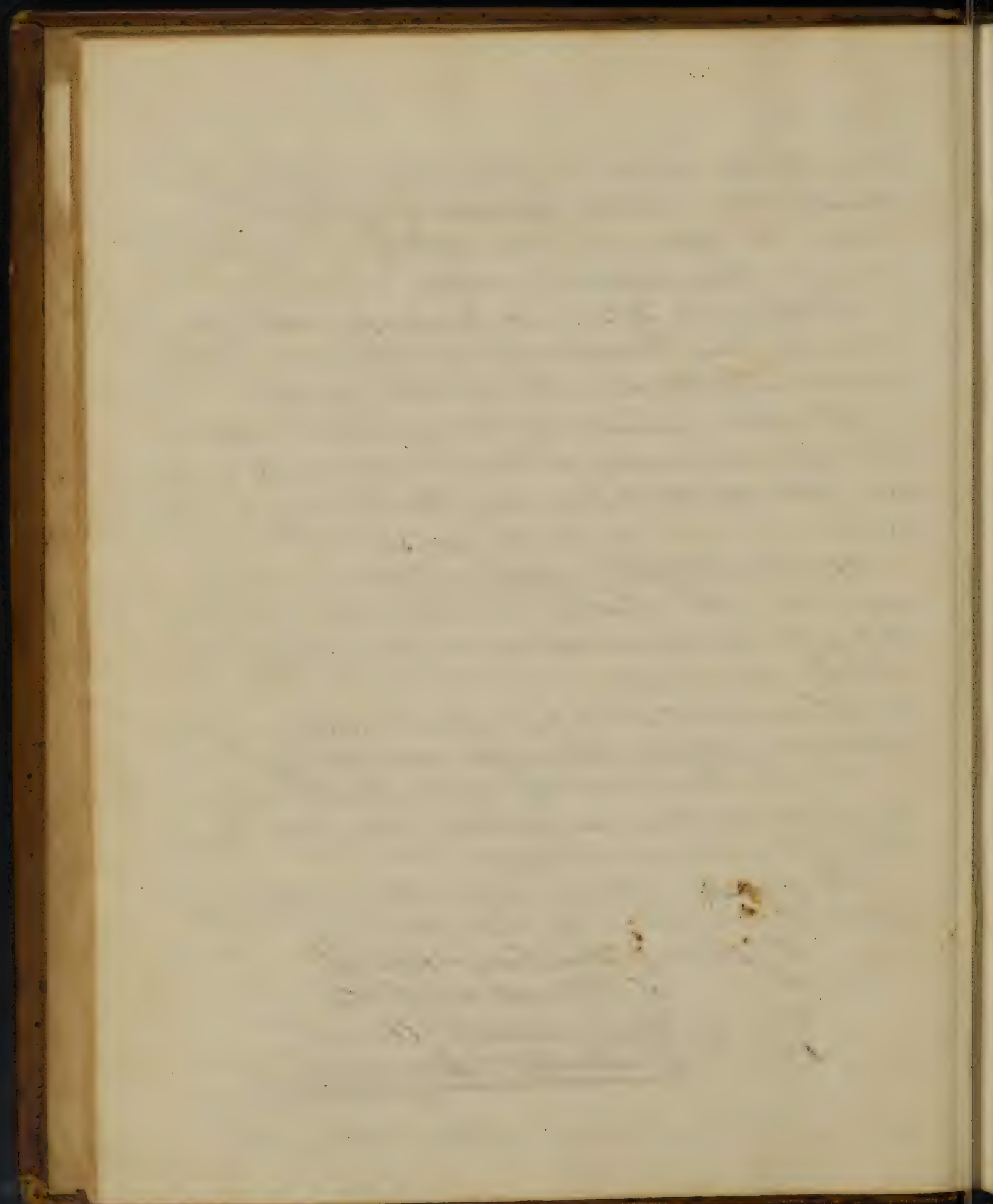
The civil relations from which relative rights result are either public or private. 1 BL. 146.

1<sup>st</sup> As to those relative rights which arise out of public relations - as Governor & Governed - Magistrate & People - &c. - 1 BL. 146. &c.

The private relations from which relative rights (& duties) result, are the four following.

- 1<sup>st</sup> That of Husband & Wife,
- 2<sup>d</sup> of Parent & Child,
- 3<sup>d</sup> of Guardian & Ward,
- 4<sup>th</sup> of Master & Servant.





# Municipal Law.

By Mr. Gould.

Law in its most general & extensive sense, is a rule of action or conduct. It is applied to all kinds of action. Must be prescribed by some superior. 1 Bl. 38.9.

Law of nature is the unrevealed law of God, or the will of God, as discovered by reason. 1 Bl. 39.

Law of Nations is in general the law of nature applied to nations or foreign States. 1 Bl. 43. Nat. pref. 1. 6. 8.

Municipal Law is a rule of civil conduct, prescribed by the supreme power of a State, commanding what is right & prohibiting what is wrong. 1 Bl. 44.

In point of fact indeed this law may not "command what is right" nor prohibit what is wrong. But every judge must enforce the law as right. The rule is to be understood only in reference to the contemplation of the law itself, & of those who enforce it.

"A rule" - & is said to be "permanent, uniform and universal". - It must be permanent - not that every law must be perpetual, only that it must not be suspended in its obligation (or operation) during the time for which it imports to be enforced; nor a law may be made for only two years. 1 Bl. 44.



## Municipal Law.

It must be "uniform & universal" i.e. as far as it extends. In other words, it must be general & not personal within its own limits, whatever those limits are. It

In Eng. are particular local customs & usages. Now these are law as far as they extend, as to a City &c. not to the whole Kingdom.

Municipal law differs from a compact in this respect - the latter is a promise proceeding from us; the former is a command directed to us. 1 Bl. 45.

Differs from natural law - as the latter is a rule of moral conduct - municipal of civil conduct.

It is "prescribed"; i.e. the rule is to be promulgated & made known to those who are to be governed by it before they are to be affected by its operation. Hence no Law ought to have a retroactive operation. It is palpably unjust to make unlawful tomorrow an act committed today when it is lawful. Difference between a retroactive or ex post facto law in this: The former has either a penal or remedial operation on acts or things past - an ex post facto, is only a penal <sup>active</sup> retrospective law. A retroactive law is not necessarily an ex post facto; as it may be remedial. But every ex post facto law is retroactive. A retroactive law is a genus, of which an ex post facto law is a species. 1 Bl. 45. b. 3 Dallas 386. 391. Bull v. Cadden, Sup. Ct. U. S.

The constitution of the U. S. prohibits all ex post facto laws, tho not all retroactive ones.

Must be prescribed by the "Supreme power"

# Municipal Law.

which is the Legislature. 1 Bl. 46. to 90.

Rules for the Interpretation of Laws are ably explained in Bl. 59. 60.

1<sup>st</sup> The words of the law are generally to be understood according to their most known, usual & popular signification. Terms of art & technical words (as those in C. D.) according to their acceptance among the learned in the art. Or in other words by reference to the art or science to which they belong. 19 Vin. 513. 6 Mod. 143. 4 Bac. 647.

2<sup>nd</sup> If the words of the law are dubious, it is well to consult the context. Thus their meaning may be established by their connexion. And the preamble, tho' no part of the law is often useful to determine the meaning of such words. For the same purpose we may refer to other laws in pari materia. - When different laws are made on one & the same subject, they are always to be construed by comparing them together. 1 Bl. 60. 1 Wils. 365. Palm. 485. 3 P. W. 185. 1 Fon. 163. 4 Bac. 645. Plow. 206. S. Ray. 1028.

3<sup>rd</sup> So if a word or phrase is ambiguous, it is always to be understood with reference to the subject matter. e.g. purchasing provisions at Rome is thus found to apply to benefices by the Pope. 1 Bl. 60.

4<sup>th</sup> When any law may admit of different constructions, regard must be had to the effects & consequences. e.g. Drawing blood in the streets of Bologna. 1 Bl. 61. 4 Bac. 652. 1 Mod. 344.

5<sup>th</sup> But the great cardinal rule in all cases is, that



## Municipal Law.

the reason & spirit of the law, must be consulted -  
"responde ratione, lex cepit." E.g. Law of Rome as to for-  
saking a Ship in a Storm. 4 Bl. 61. Plow. 232. 9 Bac. 647.

"The reason of the Law" says Lord Coke, "is the law  
itself." Every law is founded on some reason & when the  
true reason can be come at, no uncertainty arises in  
the application. Hence arises the Equity of the Law, de-  
fined by Grotius to be, "the correction of that wherein the  
law by reason of its universality is deficient." I think the  
equity of the law is meant such a construction of it  
as is agreeable to the reason & spirit of it - i.e. its true and  
rational construction. Now all the other rules are  
merely auxiliary to this, & are of no use, but as they  
show what is the reason & spirit of a Law. 19 Vin. 514, 526.  
Co. Lit. 24<sup>b</sup>. 1 Bl. 62. 3 Bl. 431.

Municipal Law is divided into

Lex non scripta and Lex scripta.

1<sup>st</sup> Lex non scripta includes, 1<sup>st</sup> Common Law  
properly so called or general customs. 2<sup>d</sup> Particular  
Customs - 3<sup>d</sup> Particular laws founded on custom  
which are observed only in certain jurisdictions, and  
called customary laws. 1 Bl. 63, 67.

But what is the C. L. called unwritten, since it is con-  
tained in Books? Because its original institution is  
not set down in writing. The writing in which it is  
found does not constitute the law itself, whereas the  
Roll of Parliam<sup>t</sup> is itself the law, & needs no usage to  
support it. 1 Bl. 64, 67.

# Municipal Law

This unwritten law derives its force & authority from immemorial usage, it having been received & adopted time immemorial. 1 Bl. 64. 67.

1<sup>st</sup> Common Law. This is a general custom, & is called "common" either to distinguish it from other laws, as the statute, civil or canon; or because it is common to the whole realm. It is mentioned by Edward & Glouc. after the abolition of provincial customs by Alfred. 1 Bl. 63. 68. 67. 74.

Common law like other branches of the unwritten law depends for its support on immemorial usage - universal reception - an usage to be immemorial must extend back beyond the time of legal memory. This is dated from the accession of Rich<sup>d</sup> I. to the throne. <sup>(A.D. 1155)</sup> The rule here given may be true in theory, but is incorrect in practice. For part of the Lib. Mercat. is C. S. tho it has altogether arisen since the time of Rich<sup>d</sup> I. - 1 Bl. 68. 2 Bl. 31. 2 Inst. 238. 9. 2 Pol. 269. pl. 16.

Where is the Common, or any other branch of the unwritten law to be found? In the records of courts of justice - in Books of Reports - in judicial decisions. & in Treatises of learned Lawyers. 1 Bl. 63. 4.

By whom is the Com. law to be expounded or explained ascertained? By judges of Cts. of justice - the depositaries & oracles of the law. 1 Bl. 69.

The records of Cts. Reports & judicial decisions are only evidences of what the C. S. is - not the law itself. Since decisions are often overruled & declared not to be law.



## Municipal Law.

which could never be if the decision of a judge was itself a law. 1 Bl. 63. 70. 1.

Precedent is a former judicial decision on a point in question, & therefore only *prima facie* evidence of what the law is. & take it a precedent is always to be followed unless flatly absurd or unjust. 1 Bl. 69. 70.

Precedents are not to be overruled merely because the reasons on which they stand are not discovered. The *onus probandi*, why it should not be continued lies upon him who objects to the precedent. Precedent is the very life of customary law & "*stare decisis*" is the most important maxim in the Eng. Law. Bull. 1. 1 East 495.

But whence did the C. L. originate, & how came it into existence? It was built up, in fact, by the Justice from the necessity of the case. Otherwise there would have been no customary law, & of course a failure of justice. For it is impossible for a most perfect Stat. law to give relief to every the slightest injury.

It may be objected that this law wants the requisite sovereign power. I answer that it is sanctioned by the acquiescence of the sovereign power & by universal usage.

But how can it be said to be immemorial? Entire branches have been made since the time of Rich. 1. - Truly - modern decisions are only taken as evidence of what the C. L. was, and always

## Municipal Law

has been. The principles of this modern law existed as much before the time of Rich.<sup>1</sup> as they do since.

### 2<sup>nd</sup> Particular Customs i.e. Local usages.

These are probably the remains of those provincial customs, out of which the C. S. was first collected by H. Fred. 1 Bl. 74, 2 Bl. 263.

Now in enforcing these particular customs the mode is very different from that used in enforcing the general law. Regularly these must be specially pleaded. He that would avail himself of one must first prove it to exist & then show that his case comes within it. Of general customs the judges are bound to take notice & make application of them to the case provided - but particular customs must be proved as well as pleaded. Litt. S. 265. Co. S. 175. 1 Bl. 76.

The jury try their existence as a matter of fact unless before tried, determined & recorded in the same Ct. in which the Qu. arises. 1 Bl. 76. Doug. 345.

There is an exception to this general rule in the cases of gavel-kind & borough-english customs. These cannot be denied because the law takes notice of their existence. It is not necessary to plead them specially, but only to prove that the thing in question is within the one or the other. St. 10 Ed. 75.

Law Merchant is called a particular custom, but I think improperly. It is not a local usage. It governs & is confined to particular transactions, that  
= out



## Municipal Law.

throughout the realm - but is not confined to local limits. 1 Bl. 75. Comb. 45. 152. 3 Bl. 436. 2 H. 459. 461. 467. 2 Day. 175. Chit. 13. 2 Sutr. 1585. 2 Vent. 295. 310.

It need not be specially pleaded like a particular Custom. Salk 125.

Law Merch. is not like a particular custom to be tried by a jury - nor proved by witnesses. 2 Burr. 1218. 1222. 1 Bl. R. 298. 4 T. R. 208. Chit. 109.

It is said there is an exception to this rule when new cases arise in which the Law merch. is doubtful. But I apprehend there is no more necessity of this here than in certain cases of the C. S. Books or the testimony of learned & experienced men may be resorted to in both cases. I trust however that a Judge would not at this day call in a Merch. to testify what the principle of Law is, but only to prove facts or the meaning of particular words, just as he would satisfy himself from a Dictionary. Chit. 28. 109. Burr. 1216. 1 Bl. R. 295. Doug. 72. 73. 653. -

## Legality of Customs.

Every custom to be good, must have certain requisites. 1<sup>st</sup> It must have been immemorial. 2<sup>d</sup> Continued & uninterrupted; any interruption of its exercise does not destroy it, but the shortest interruption of the right does. 3<sup>d</sup> Peaceable - i.e. acquired in, or common consent (otherwise implied from immemorial usage) is wanted. 4<sup>th</sup> Must be

## Municipal Law.

be reasonable or rather not unreasonable. e.g. custom of putting beasts into common is good, unless a sufficient reason can be assigned against it. <sup>(b)</sup> 5<sup>th</sup> Certain, as descent to the most worthy of ones blood w<sup>d</sup> be too loose & vague for practical application & of course, bad <sup>(c)</sup> 6<sup>th</sup> Compulsory; since these customs as far as they extend form rules of conduct. but rules are always compulsory. A custom to contribute at ones pleasure is therefore bad 7<sup>th</sup> Consistent with each other; for two contradictory destroy each other. <sup>(d)</sup> as if A. in an action of nuisance claims a right to have his windows unobstructed, & B. pleads that he has a right to obstruct them at pleasure, this plea is bad. <sup>(a)</sup> 1 Bl. 70. 7. Co Lit 113. 4. <sup>(b)</sup> Co L. 62. Litt J. 212. 1 Bl. 77. <sup>(c)</sup> 1 Bl. 78. 1 Pol. 565. <sup>(d)</sup> 1 Bl. 78. 9 Co 56.

Customs in derogation of the C. L. are to be strictly construed. i.e. they are not to be extended beyond their letter, by what is called the Equity of the Law. Thus by custom of gavelkind (& in no other way or custom) an infant may by deed of propprt. convey in fee simple. but he may not in any other way or by any other conveyance. He may not even lease. 1 Bl. 78. 9.

All special customs must submit to the Kings prerogative. as if the King purchases lands of the nature of gavelkind, upon his demise, his eldest son alone, shall succeed to the inheritance. 1 Bl. 79. Co Lit. 15.



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3<sup>d</sup> Certain Particular Laws, adopted by custom & used only in particular courts. Such are the civic & canon or ecclesiastical laws of the Roman Empire. These are used only in Cts. ecclesiastical, military maritime & of the Universities. They are local in their administration, not in their operation as are particular customs. 1 Bl. 67. to 83.

These Laws are binding in Eng<sup>d</sup> by adoption, not on account of any intrinsic authority possessed by them in that kingdom. 1 Bl. 79. 80.

This adoption may be either by immemorial usage in Cts. of justice when they become a part of the unwritten law - or by act of Parli<sup>t</sup>. when they become a part of the written law. 1 Bl. 79. 80.

Com. & Stat. laws of Eng. (so far as they are binding in Conn.) derive their authority from a similar sanction, i.e. adoption. They were not originally binding here at all. But our Cts. ought not now to reject the C. L. of Eng. except so far as it clearly appears absurd, unjust or inapplicable to the circumstances of our country. It *prima facie* binds here in all cases. for in general it has been adopted & acted upon as our law by usage & common consent - Our citizens consider it as the rule of their civil conduct. They conduct their civil concerns with reference to it. It is in effect the C. L. of the U. S. - 1 Tuck. Bl. 411. 429.

What Eng. Stat. are, *prima facie* binding here, 3 Co. p. 1.

## Municipal Law.

Much sophistry has been used to prove that this country cannot have a C. S. of its own; but

Firstly. So far as that of Eng. is inapplicable to our situation, we must have a customary law of our own. It is indispensably necessary to prevent a failure of justice. Stat. law is incapable of affording a single complete remedy without the aid of such C. S. - e.g. suppose our Legislature should discard all C. S. & make a Stat. prohibiting battery, & giving the person beaten a right of action for damages. But what is an action? The Stat. does not tell. - And what action? "Case" or "vi et armis"? This the Stat. must tell which w<sup>d</sup> take a volume. How is the action to be brought? By writ. What is a writ. - Is he to plead? What is pleading? - Is the case to be proved? What are witnesses? - Thus you might proceed with this action & raise difficulties without end. - Then you might take ten thousand other cases and proceed in the same way. -

Secondly. So far as the C. S. of Eng. is absurd or unjust, we may have one of our own, & are not bound to adopt their rules. - indeed we ought not. - What then is to be done? - shall we have no rule in such case?

The main objection to both the above propositions is, that we are too young. - our customs cannot extend back to Rich. 1. the date of legal memory. - that our judicial decisions are not



## Municipal Law.

supported by immemorial usages. Answer - That this Eng<sup>l</sup> rule is merely arbitrary & emphatically inapplicable to our Country. The date of legal memory was established only 60 years after the accession of Rich.<sup>1</sup>. Then a custom 60 years old was good. Why may we not adopt the rule here as it originally was with them, if we adopt it at all? 2 Bl. 31. n.

But further, general consent, & long acquiescence tho not immemorial in the above arbitrary sense is sufficient to make a custom good; & this as I before said from the necessity of the case. It has been so settled.

Besides the above objection is itself illogical & futile. It assigns no reason to the affirmative of the question, but merely answers it in the negative. The question is, can we have a C. S. of our own to supply the defects of the Eng<sup>l</sup> C. S. ? No. because in doing it we shall contravene a rule of the C. S. - i.e. we cannot because we cannot. This is "petitio principii".

No rational, uniform system of jurisprudence could exist, unless each sovereign State should have a customary Law of its own.

## Municipal Law.

### 11<sup>th</sup> Lex Scripta, i.e. Statute Law.

The writing, here constitutes the law *per se*, it is not mere evidence of it as is the C. S. Some parts of the C. S. are perhaps derived from old Stat. not now extant. 1 B.C. 85. 88. 8 Co 20. )

The oldest Eng. Stat. now extant is the famous Magna Charta, as confirmed in Parlm.<sup>t</sup> This is somewhat different from that of King John 1<sup>st</sup> Hen. III. 1 B.C. 85. 2 Hume Hist. Eng. 145.

Ancient Eng. Stats. are said to be binding here as far as the C. S. of Eng. is i.e. they are *prima facie* Law of the Land. No person contends that they are binding absolutely, but so far as they are applicable to our situation. The reason assigned in the Eng. Books, why any of the Eng. Stats. are obligatory upon us, is, that our ancestors, on their emigration hither bro't with them so much of the law of the parent country as was then extant, as a birthright. The Eng. books all agree that their Stats. were laws of the colonies. Many Eng. Stats. have been adopted by our Cts. of Justice. So that what in Eng. is called written law may here in a measure be called unwritten or customary. 1 B.C. 106. 8. 1 Tunk. B.C. 391. 3. 380. 4. Salk 411. 666. Pow. D. 52. 2 P.W. 75. Tink. 369.



# Municipal Law.

## Kinds of Statutes.

1<sup>st</sup>. All Statutes are either Public or Private - or general or special. - 1 Bl. 85.

Public Stat. is one which regards the whole community. Private regards particular persons & private concerns. It is a sort of exception to the general law. 1 Bl. 85, 6.

I think this definition defective, but a better one is not easily given. The application of this distinction is not always obvious. Most public Stats. do indeed literally & immediately regard the whole community. Such is the Stat. of Frauds, usury, limitations &c. Some Stat. enacting that no person shall do thus & thus or that whoever shall do thus, shall be guilty &c. concerns the community, tho it operates only on certain persons.

But in many cases Stats. relating immediately in terms to a particular class of men only are public. This rule then gives an important distinction. That if the class of persons to whom a Stat. immediately relates amounts to a genus or is divisible into subordinate classes, the Stat. is public if to a species only or to individuals, it is private. - e.g. a Stat. relating to all mechanics is public. - to all Taylors or Shoemakers &c. is private. A Stat. respecting all officers qualified to bear a legal process is public. - respecting all constables. is private. So a Stat. respecting J. S. is clearly private. - Ex. gr. 15.

## Municipal Law.

"all Sheriffs & other officers" public. 2<sup>d</sup> "all Sheriffs" or "Sheriff of the County of A." private. 1 Bl. 86. 4 Co. 76. 19 Vin. ab. 496. 5. 2 Saund 254. 1 Ser. 86. 2 Ray. 12 C. 381. 4 Bac 639.

In Eng. every Stat. which concerns the King is public. So if it respects the head of the body politic, as a Governor of a State. But one relating to Jonas Galusta is private. 4 Bac. 640. 4 Co. 77. 8 Co. 28. 138. Hob 227. Sid 209.

Hence a Stat. giving a forfeiture to the King in here to the State, is public, tho it concerns only a species of persons. As a Stat. forbidding shoemakers to work at a certain part of their trade, under a penalty. 4 Bac 640. Skin. 429.

So a Stat. which concerns the public revenue, or treasury is ipso facto public. 4 Bac 640. 12 Mod 249. 513. 10 Co. 87. How. 65.

A Stat. may be & often is partly public & partly private. 4 Bac 640.

III<sup>d</sup> Another Division. - All Stat<sup>s</sup> are either declaratory of the C. E. or remedial of some defect in it.

This division is coordinate with, & not subordinate to the one above. A remedial Stat. e.g. may be public or private. 1 Bl. 86.

Declaratory Stats. declare what the C. E. is & always has been - e.g. our Stat. defining the tenure of lands in fee simple. 1 Bl. 86. St. Con. 250.

Stats. remedial of defects &c introduce new law, by supplying the deficiencies, or abridging the power =



## Municipal Law.

ities: the C. S. instead of limitations, *quidam*. Most Stat. are remedial. 1 Bl. 86.

III<sup>rd</sup>. All Stat. are also penal or remedial (or beneficial as S.<sup>r</sup> Coke more properly calls it, being opposite to penal.) 2 Co. 7<sup>b</sup>.

Penal Stat. are those inflicting any penalty or punishment. (words in their extensive sense, synonymous.) 4 Bac. 450. 1. Bro. J. 414. 5. So in strictness all Stat. giving higher remedies than the rules of natural justice require are penal; for they certainly operate penally, tho they are not so considered in the Eng<sup>l</sup> books. e. g. Those giving double damages. Salk. 212. Bro. J. 414. 6. (Wils. 125) Com. Dist. Act<sup>n</sup> on Stat. A. 1.

Remedial (or Beneficial) Stat. are those not penal or not inflicting a penalty or punishment of any kind. 4 Bac. 450. 1. 12 Wils. 126. 7 J. B. 259.

Stat. giving Costs have always been held in Eng<sup>l</sup> to be penal. For Costs were entirely unknown at C. S. & therefore regarded as a kind of penalty. They were first allowed by Stat. of Gloucester, 6. Edw. I. Salk 205. Caith. 119. 122. 4 All. 57. Comb. 100. 1 Bac. 511. 4 Bac. 651. Hart. 357. 2 Inst. 285. Mullock Law of Costs.

But an action brought by an individual in his own right to recover a penalty is a civil action, tho the law under which it is brought is penal. (e. g. An action of Debt on 7<sup>th</sup> Eng<sup>l</sup> Stat. as bribery.) The suit is between A. & B. not on a public or criminal prosecution, for then the action w<sup>d</sup> be penal. Cowp. 382. 394. 12 Wils. 125. 4 D. R. 750. 7 J. B. 257. 1 Root

## Municipal Law.

14<sup>th</sup>. All Stats. are affirmative, or negative. They are distinguished by their phraseology, from being put in affirmative or negative terms. This distinction is of little consequence. 4 Bac 641. 2 Inst 200. 1 Bl. 89.

### From what time Stats. have effect.

In Eng<sup>d</sup>. every Stat. commences its operation on the first day of that session of Parlt<sup>t</sup>. in which it is enacted, unless some other time is fixed, as is frequently the case. The whole part<sup>t</sup>. is consid<sup>d</sup>. but one day. Hence it is manifest that acts of Parlt<sup>t</sup>. will in many instances have a retroactive operation. 4 Bac. 634. 7 Co. 111. 309. 222. S. Ray. 371. 19 Vin. 495. 1 Sid. 310.

On this general ground that there is no fractional part of a session, it has been held that if two Stats. are enacted in the same session & on the same subject (no time being fixed for their operation to commence) neither has priority, & therefore if opposed they destroy each other. 1 Jones 22. 4 Bac 634.

It is also held that if two thus enacted are repugnant, the latter only shall have effect. This latter seems the better opinion. 4 Bac 634. 6 Allod 287. 19 Vin. 520.

This rule of Eng<sup>d</sup>. law has never been adopted in Con. & no definite rule is here established. But all must have the means of knowing the law before their rights are affected by it. Hence no Stat. takes effect till the close of that session of the Legislature in which it was enacted - nor till the Representatives have had time to return home and inform their constituents. —



## Municipal Law Of the Construction of Statutes.

What the construction of Stats. is see 1 Bow. C. 370.

The rules to be observed in the construction of Stats. are intended to aid the mind in discovering what J. Law is - or in other words, the will & intention of the Legislature.

In the construction of Stats. (especially remedial ones) three points are to be considered - the old Law - the mischiefs & the remedy - i.e. what the law was at J. time of making the act - what the mischief or evil for which the old law did not provide - & what remedy the Stat. has provided. The construction should then be such as to suppress the mischief & advance the remedy. 1 Bl. 87. 363. 6.

The first two are principally important: For the object of the rule seems to be to discover from these two what the remedy is - e.g. Leases by Bishops for more than 21. years are declared void - but adjudged to be good during the Bishop's continuance in his see.

The rules before laid down (pages 3) with respect to the interpretation of law in general are to be observed under this head; viz. that words of common use are to be understood generally according to their most known usual & popular signification. - Terms of art &c.

Penal Stats. are to be construed strictly according to their letter. e.g. Stealing horses deprives one of clergy by Stat. 1 Edw. VI. - Stealing a horse was held not within it. The rule is not well expressed, but its true meaning is that penal Stats are to be construed

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strictly ~~as~~ the subject & equitably for him - i.e. a person shall not be adjudged within a penal Stat. unless he is within the letter of it, tho clearly within the spirit or reason. Hence the construction is strict. 1 B.C. 88. 4 Bae 651. 3 Co. 78. Leach 107. 8 Mod 65. Plow. 17. Leach, S. 1. 70. 295.

On the other hand tho within the letter, he shall not be adjudged within the Stat. unless he is also within the spirit & reason of it. Leach 233. 310.

The spirit then of a penal Stat. may be consulted to take one out of it, not to bring him within it. He must be within both letter & spirit to be punishable under it. e.g. A Stat. declares that "whoever does a certain act shall be guilty of felony." now a Judge will interpose his power & not bring a madman within it by a liberal construction. Thus penal laws always lean to the interest of the prisoner. 4 Bae 649. Plow 655.

And in general any universality of expression, in penal Stat. includes not, unless named, those who by reason of legal incapacity are exempted from laws similar in operation &c. e.g. Infants in cases of corporal punishment. 1 Hawk. 147. 283. 19 Vin. 501. (page)

The intention of the Legislature is not however to be disregarded in construing penal Stats. ~~as~~ the subject. The intention if apparent ought to be the criterion in construing all Stats. if not the Law is evaded, because the will of the Legislator is the Law. 4 Bae 651. 3 Co. 7. 8 Mod 65. Plow 86. 4 T. B. 3.

Another case illustrates the benignity of the Law.

(\* Leach 237. 1 Hawk Stat. lib. penal Stat 53. 61. 116. 131. 138. 9. 4 Bae 193. 4 Bae 651. Plow 17.)



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viz. If the repetition of an offence incur an increased punishment, the offender is not subjected to it unless judgment has been given vs him for a former offence of the same kind. May he must have been convicted of the first before the second was committed. I think this is giving too liberal a construction. 4 Bac. 651. 1 Haw. 168. 1 Hale 324. 570. 685. Dy. 323. 2 Bulstr. 349. Root 52. 103.

The rule of strict construction, (as vs the subject) has not been uniformly observed. e.g. By Stat. 25 Edw. 3<sup>d</sup> a servant who kills his master, is guilty of petit treason. This was construed to extend to the killing a master's wife. Two Stat. of Hen 8. & Hen. 7<sup>th</sup> made the departure of a soldier from his captain, without licence, felony. Departure from a conductor was held to be within them. 4 Bac. 651. Plow. 86. Cro. 71.

Local laws of one country cannot be noticed in another, so as to affect the rights of citizens in the latter, for they are strictly local. on this principle an offence committed in one country cannot be prosecuted in another. - (i.e. a civil offence.) Kelly, 79. 80.

There has been a practice here to which I can't assent. If a horse be stolen in N. York & brought into this State, the offence must be prosecuted here. (may not now in Conn. but may in Mass.) For they say if a thief steals goods in one county & carries them into another, he may be there prosecuted. The cases are different. In the latter case the thief is still breaking the same State law. In the former case he is in another sovereignty.

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Suppose the punishment to be different in different States - in N. Y. fine in Conn. hanging - Shall he who has done an act subjecting him to fine, be hanged by for coming into this State? Further if the practice were correct, he might be punished for the same offence in every State in the Union. For no one State is bound to take notice of a conviction & punishment in another. - On this point Judge Reeve differs from Mr. Gould. He says the thief is only consummating the act of theft by keeping the horse, & if he keeps him in this State he commits theft under our Laws & may be punished by our Laws. Who shall decide when doctors disagree? (7.7.) vide case U. S. v. Page.

But tho the penal laws of one Country are local & affect not the citizens of another, still they extend to aliens, while in the realm. 1 H. Bl. 123. 3 T. 733. July 38. Kellogg & ex. v. Baldwin Sup. Ct. Aug. 1801.

It has been determined here that where a penalty is repeatedly incurred by the continuance of an offence (as in the case of nuisance) one penalty only can be sued for at a time. Aliter in Eng. 1100. 52. 2 Lev. 289. Com. Pleas, 6. 57.

Remedial (or beneficial) Stats. are construed liberally or equitably. The latter may be enlarged or restricted to effectuate the intent of the Legislature. i.e. cases not within the latter are adjudged within the Stat. or not according to the spirit & reason of the Law. Thus by a liberality of construction, the Stat. of Edw. 3. giving a remedy to Executors was held to extend to adm<sup>ors</sup>. Again



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by Stat. 32 Hen. 8. all persons were authorized to devise, yet by construction it was held not to include *femes covert*, infants, idiots &c. — 3 Bl. 430. 1. 4 Bac. 649. 50. 3 Mo. 381. 6. 3 Co. 7. 1 Co. 123. 11 Co. 71. Plow. 365. 465. Pow. Div. 140. 1. Plow 467. Dy. 354. 4. 12 vs. 300.

A Stat. taking away a C. S. remedy is to be construed strictly, & not extended beyond its letter. I suppose, because it abridges the rights of the subject. Thus the Stat. of Limitations abridge their rights by taking away the C. S. remedy. 4 Bac 650. 10 Mo. 282.

Again the words of an explanatory Stat. (i.e. one explaining a former Stat.) are not to be extended by construction beyond the letter, but must be taken in their strict sense: otherwise there would be no end of constructions, as each construction itself might be construed liberally & so on *ad infinitum*. 4 Bac 650. Carth 396. Salk 334.

It frequently happens that Stats. are partly penal & partly remedial. The construction is strict as to the former & liberal as to the latter. Thus Stats. v. fraud are construed strictly as to the offender, liberally as to the offence. i.e. to set aside the fraudulent transaction. 4 Bac. 650. 2. Plow. 36. 59. 57. Cr. Chy. 215. 1 Bl. 88. 3 Co. 82. —

And it is a very material rule that the different parts of the Stat. must be so construed that the whole may stand if possible; "*ut res magis valeat quam pereat*". A construction destroying a part is from that circumstance

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a bad one, & yet this is sometimes the case. But a saving totally repugnant to the body of the act is void. e.g. If a Stat. vests in the king the lands of A. saving the right of A. 1 Bl. 89. 1 Co. 47.

When two Stats. are repugnant to each other the latter in point of date repeals the former. So if the C. Stat. differ the former give place to the latter. 4 Bac. 638. 641. 2 Com. 226.

So if the latter part of a Stat. is repugnant to the former part, so that they cannot be reconciled, the former part is repealed so far as it is repugnant. This is different from the case of saving *supra* because this may proceed from mistake, the other cannot be accounted for from inadvertence. 4 Com. 381. 19 Vin. 511. 1 Co. 6 Mod 287. Co. L. 111. 115. 1 Bl. 89. 11 Co. 63. 4 Bac. 638.

Every Stat. is in its nature repealable. Therefore a clause in a Stat. that it shall not be repealed is void. Such clause is in derogation of the power of subsequent legislatures, because if a legislature cannot repeal a law, they are not the sovereign power this requiring as much power as the making of laws. 4 Bac 638. 4 Inst. 43.

Indeed it is a general rule that all acts in derogation of subsequent Legislatures are void. 1 Bl. 90. 4 Bac 638. 4 Inst. 43.

But the law does not favor a repeal of Stats. by implication; the repugnancy sh<sup>d</sup>. be clear & certain to have effect. Yet there often is a repeal by implication. 4 Bac 638. 9. 11 Co 63. 10 Mod 118. 10 W. R. 88.



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It is said that affirmative Stats. do not abrogate the C. S. - I think this is incorrect. They do if they imply a negative of the C. S. i.e. are inconsistent with it. e.g. If by C. S. six days notice to a Deft. is good & a Stat. requires 12 days. In reality it makes no difference whether the Stat. be couched in affirmative or negative terms. I suspect the C. S. has as often been repealed by the form or as the latter. 4 Bac. 641. Co S. 111. 115. 2 Inst 200. 1 Bl. 89. Common action Stat. C. death 252. Plow 200.

If a Stat. inflicts a higher or lower punishment for a given offence than is inflicted by an elder Stat. the elder is repealed. Stat. 252. Burr. 2026. 4 Bac. 654. 12.

So if a penal Stat. inflicts a lower punishment than that prescribed by the C. S. the latter is abrogated. & yet if the Stat. inflicts a higher punishment, it appears to be the rule, that the C. S. remains in force. 10 Mod 337. 4 Bac. 654. pl. 12. 4 Burr. 2026. 2 Show. 30.

In many cases affirmative or negative Stats. do not abrogate the C. S. in relation to the same subject. There are then two concurrent remedies & the party may resort to either. In such cases the Stat. remedy is called Cumulative. as if a Stat. gives double damages for certain trespasses, it is <sup>only</sup> cumulative. 2 Burr. 803. 805.

It is said that one affirmative Stat. does not repeal another affirmative Stat. The rule was confined to cases where there was an antecedent C. S. remedy. It is curious to observe the explanation of the rule in Showers Rep. vol. 2. 30. page - "an affirmative Stat.

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concerning any thing that was not at C. D. implies a negative of all other things.") I consider the rule to be arbitrary & unmeaning. one affirmative Stat. always repeals another if it implies a negative of the 1<sup>st</sup> one, i.e. if it is repugnant to it. The only question then is, "is it repugnant or inconsistent; if so the former is repealed, aliter non.— 1 B.C. 89.

This discovers the intention of the Legislature, which is ultimately the criterion in all cases. 4 T.R. 3, 4 Bac. 647. 8. Plow. 232, 11 Co. 73.

The above pivotal distinctions, in the books, between affirmative & negative Stats. are not intended to apply to Stats. containing express clauses of repeal.

Whenever a Stat. repealing a previous one is itself repealed, the former Stat. is *ipso facto* revived. For the first was repealed only by virtue of the repealing Stat. 1 B.C. 90. 4 Inst. 325. 4 Bac. 638.

But if one Stat. is repealed by three different Stats. two of which are afterwards themselves repealed, the remaining one still stands & continues the repeal of the original one. 4 Bac. 638. 4 Inst. 43.

And on the other hand if a Stat. which has been repealed is revived, then the repealing Stat. from the nature of the case becomes void, & is itself repealed. 2 Inst. 686. 4 Bac. 638.

It is a rule that when a Stat. is repealed, all acts done under it during its continuance are valid. I find a rule in Jenkins (233.) to one part of which



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I cannot give my assent. It is also said in Bacon "that when a Stat. is declared null ab initio by a subsequent legislature all acts done under it during its continuance are void. This is contrary to the first principles of jurisprudence. Indeed I think it is too late to contend that one Legislature may make void the acts of a former one, though they may indeed repeal their acts. It is not the province of the Legislature but of the judges to decide on the constitutionality of laws.  
4 Bac 638.

When one Stat. is expressly repealed by another which makes different provisions on the same subject to continue for a limited time, the former does not revive on the expiration of the latter unless the intention of the Legislature to that effect be expressed.  
3 East, 205.

As a general rule, no law can have, tho' they sometimes do have, a retro-active operation. Hence if a Stat. after being violated & before judgment the offender is repealed, & a new one made, he is not punishable under either - The old law no longer exists & the offence was not committed under the new law. The offender may however in certain cases be punished at C. S. Indeed he may be punished under the first Stat. if as is now common, the repealing Stat. contains a proviso or clause declaring the old Stat. in force as to all acts committed under it. This doctrine

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was recognized in the Circuit Ct. of the U. S. vs. Tru-  
well in April 1808. 4 Bac. 636. 2 Mod 310. 13 C. 40. 13 C. =  
R. 451. 1 Hawk 169. Root 59. Bac. 636.

But if a covenant to do an act lawful at y. time  
is made unlawful by a subsequent Stat. the covenant  
is annulled. e.g. An covenant to export goods to a For-  
eign, & before he performs his contract war is de-  
clared vs that foreign State - or exportation is prohib-  
ited. No law made by Congress impairing the obliga-  
tion of contracts is valid. Const. U. S. art. 1. § 10. tit. 1. -  
vid. Salk 198. 1 Bou C. 444. b. By. 27. pt. 278. 1 Rob. 451. 8. May 317.  
321. 1352. 8. Mod 51. 374. 5 Bro. P. C. 269. 2 P. W. 218. 1 Fombl. 211. All.  
27. 8 C. W. 267. -

So on the other hand if one covenants not to do  
an act which is afterwards made his duty by Stat. y.  
covenant is annulled. e.g. An apprentice covenants  
not to leave his masters service. By a Stat. (subsequent)  
he is compelled to enter an army - Here the annull-  
ing or suspension of the covenant is not the object  
of the law but the mere consequence of a rule which  
the Legislature has a right to make. Salk 198.

I conceive that neither of these cases are incon-  
sistent with the above clause of the Cons<sup>n</sup> of the U. S. I  
suppose the true distinction on this point to be, that  
where a contract is violated by an indirect conseq<sup>ce</sup>  
of a Stat. the contract must give way. But no Legisla-  
ture can make laws for the express purpose of impair-  
ing a class of contr<sup>ts</sup> & which by their very terms do impair them.



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But if one covenants not to do an unlawful act & afterwards a Stat. makes it lawful, the covenant is not annulled. In the two former cases the covenant is opposed to the St. - in the latter case not. Salk 198.

If a contract declared illegal by Stat. is made while the Stat. is in force, a subsequent repeal of the Stat. does not make the contract good. It cannot make good, what is *ab initio* bad - e.g. A note given on unstamped paper during the continuance of the stamp act. 176. 132. 65.

If a complete performance of an agreement is made illegal by a subsequent Stat. still if it can be partly executed consistently with the Stat. that part may be enforced even in Cts. of law, tho it is usually enforced in Equity. e.g. An agreement by a Dean & Chapter to lease for 99 years may be enforced for 40. It is enforced *cy pres.* i.e. so far as is consistent &c. - Flow 284. 276. Pl. 581. 163. 1 Forbl. 209. 211. 3 Bro. P.C. 389. 2 T.R. 254. 2 Pow C. 31. 10 Pow. 448. 450.

The rule is the same where a complete & literal performance is prevented by an act of God, or inevitable accident. Thus if A. covenants to convey to B. two houses & one be destroyed by lightning, still he shall be bound to convey the remaining one. The doctrine of *cy pres.* in Norman French is the rule by which a contract is thus enforced as far as may be. 10 Pow C. 448 &c. Flow 284. 1 Eq. ca. ab. 18. Ta. Conts.

Stats. requiring what is impossible are of no validity. "*Lex non cogit ad impossibilia*," is an important maxim in the Eng. C. L. 13 C. 91.

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It is laid down by S<sup>r</sup> Hobart that Stat<sup>s</sup> contrary to reason or the law of God are void. So says Blackstone, in one place & contradicts it in another. Now this principle acted upon would destroy the administration of any regular government. Opinions are different among men, as to what the law of God is - I think that when the Legislature clearly intended to make an unreasonable or wicked law, it must be enforced. But the rule laid down is just as to laws in their collateral consequences unreasonable & probably unenforced. The judges may expound them by equity & quoad hoc, disregard them. 8 Co. 118. Hob. 87. 9. 17 tabl. 23. 130. 91. 41.

The municipal law of the land must govern & judges have no power to abrogate or annul them because unreasonable or irreligious. A judge is "jus d<sup>e</sup>-cernere non jus dare."

Whether Stat<sup>s</sup> opposed to a written Constitution are valid is a totally different question. It is clearly settled in the U. S. that they are not. The Constitution is part of the civil law & of <sup>paramount</sup> ~~paramount~~ authority to any other law or Stat<sup>s</sup>. The object of the Constitution is to restrain Legislative usurpations. Hence if the Legislature have a right to infringe on its principles, it is a nullity. The judges must determine the constitutionality of laws. So settled in every State of the U. S. - Federalist - 2 vol. p. 293. 4<sup>th</sup> - Discussed in Chas's Trial -

A general rule that when a Stat enables a Ct. to do a matter of justice to a party, the Ct. is bound to do it in cases falling within the Stat. - "May" is construed as



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"Shall" in such cases & indeed in most cases e.g. Stat. 4 & 5. Wm.  
& Mary authorizing Ct. of K. B. to award costs to Dfts in  
certain cases on information. 4 Bac 644. 2 How 263, 374.  
Straw 1131. 5 T. R. 538.

If a Stat. makes a new law concerning an old offence  
by appointing certain particular judges to execute it, the juris-  
diction of the Ct. of K. B. is not thereby excluded. For it  
is a rule that Cts. cannot be ousted of their jurisdiction  
by implication. So if it provide that all crimes of a  
certain denomination shall be tried by certain judges.  
e.g. 1 How 8. q. 114. q. Co. 118. Salk 564. 1. Mod 452. Burr. 1042.

But if the Stat. creates a new offence & directs that  
it be tried in an inferior C. S. Ct. the cause may be re-  
moved into Ct. of K. B. by certiorari, &c. Cowp. 524.

So if the Stat. creates a new offence & establishes  
a new jurisdiction for the trial of it. I question this.  
It appears to me the better opinion that in this case  
the jurisdiction of B. N. & ordinary Cts. is wholly exclu-  
ded. 1 How 4. 1 Ed. 196. 2 Hale 5. Crop. 643. vid Cowp. 524. How  
302. note.

If by Stat. a special authority is given to certain  
persons, affecting the property of individuals, it must be strict-  
ly pursued; & it must appear so upon the face of the proceed-  
ings, otherwise it is not valid & they are trespassers. Cowp. 26.

If a Stat. enables a body of men to do certain acts by  
vote of a majority & constitutes a certain number a quorum.  
it is a question whether a majority of the quorum, unless  
it be also a majority of the whole, can act for the whole.

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By the better opinion they cannot. Such bodies are the creatures of the Stat. & have no other powers than are expressly given or necessarily incident to them. But such power is not necessary to their existence. 4 Bac 642. 3 Mod. 13. 1 Mol. 513. 10 Co. 30. Hob. 211. 3 T.R. 594. 4 H. 810. 822.

If an authority of a private nature is conferred by Stat. upon two or more persons, it is joint & not several unless otherwise expressed. And if one dies, it does not survive to the rest. Root 67. Tit. Divisio.

But if the power is of a public nature, I apprehend it is several as well as joint, & that it will survive. Str. 117. 4 Bac 403 n. 442. Co Lit 181. Tit Sheriffs &c

If a power of a public nature is given to several the act of the majority in the execution of it (all being present) is the act of all. Thus the judges of a Ct. need not all concur to make the judgment valid. Because perhaps, of the necessity that this business sh<sup>d</sup> be done, & sometimes it never could be done were unanimity required. The preceding rules do not apply to Corporations. 10 Bos & P. 229. Co L. 181. 1 Burr. 1017. 1020. 3 T.R. 592.

In case of Corporations (all being summoned) the majority of those present, may bind the whole. A corporation is a legal entity, & no notice is taken of the individuals who compose it. 2 Atk 212. 10 Bos & P. 2367.

There have been great mistakes as to the word "void" in Stats. The rule of construction I take to be this. If when a contract is declared "void" it can be construed consistently with the object of the Stat. to be only "voidable"



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it is the proper construction. 1 Bl. 87. 2 New. R. 413. Co. S. 45. 3 Co. 60. 59<sup>th</sup>. But if this would defeat the object of the Stat. it must be taken strictly & the contract is utterly void. This may be illustrated by the former case of Leases between a Dean & Chapter. Had the word void been there taken literally & strictly any lease for more than 40 years w<sup>d</sup> not have been good for any time, but void ab initio. But it was taken to be only voidable & good during the life of the Dean. So of our Stat. w. fraudulent conveyances, which are void as to immediate creditors. Cro. E. 207. 2 T. R. 606. 7 T. R. 310. Stat. c. 355.

It has been said that "void" when used alone might be construed "voidable", but that it would be otherwise if the words "to all intents &c" were added. But this is not the criterion - for "void to all intents & purposes" has been construed voidable. 2 T. R. 606. Cro. E. 141. 3 Co. 59. 60. 10 Co. 59<sup>th</sup>.

A void Stat. is one which has no effect & never can become good or have a binding force. Any one who has an interest in so doing, may avoid it. Avoidable Stat. binds all persons till it is avoided; & no other than one of the parties or their privies can avoid it.

Several Stats. relating to the same subject are all to be consid<sup>d</sup> in construing one. sup<sup>a</sup> p. ) 4 Bac. 646. Plow. 206. E. 10. 1028.

The rules of construction are the same in Equity as at Law; the object of both being the same, i.e. to discover the intent of the Legislature. But the remedy or relief, (i.e. the mode of enforcing the Law) is in many cases dif.

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different. As to construing contracts vid. Wal. S. 8. 47. 8. Doug 264.  
all contracts except "personal bonds" and "mortgages" construed as  
Statutes.

### Of Pleading Stat. & the mode of prosecuting upon them.

Pleading a Stat. requires nothing more than a state-  
ment of the facts which bring the case within it. Thus in  
pleading in an action of assumpsit, the Deft asserts "non  
assumpsit infra sex annos," without any express reference to  
the Stat. of Limitations. It would be unnecessary, & unlan-  
guful to state that such a Stat. had been made & at such  
a time &c. - Again it is sufficient to state that a cer-  
tain contract is not in writing without observing of  
a Stat. of frauds & perjuries made in 29 Car. II. requires  
such contracts to be in writing. 3 S. Ray. 11. 221.

Counting upon a Stat. consists in an express reference  
to it. as by the words "against the form &c. of the Stat. in  
such cases made &c." or by other words adapted to the case,  
"by virtue of the Stat" &c. When a Stat. is counted upon it is  
regularly pleaded.

Reciting a Stat. is quoting its contents. It is dis-  
tinct from both the preceding, tho frequently Stats. are plea-  
ded by reciting them. It is uncouth, unusual, & for the most  
part wholly unnecessary. (The distinction between pleading  
counting upon & reciting a Stat. is clear. but no subject  
is more confused by writers. Bacon cannot be understood  
upon it.)

It is a general rule. that Judges are bound ex officio  
to take notice of public Stats. i.e. without their being set



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out. (Exceptions post p.) But it is necessary at C.S. that a private Stat. be specially pleaded & shown in order to take advantage of it. Public Stats. are the laws of the land - but private Stats. are the mere evidence of private right & the judges are no more bound to know them than the contents of a private deed. <sup>1 Bac. 86. 4 Co. 76. Cro. E. 238. 19 Vin. 498.</sup>  
<sup>1 Bac. 38. 10 Co. 57. 2 Mod. 57. 2 Rot. 456.</sup>

In Conn. however under the Stat. of pleading, a private as well as a public Stat. may be given in evidence by way of defence (i.e. by the Deft.) under the general issue without pleading it. This is a local usage. But a private Stat. must be read when given in evidence - a public Stat. need not be Stat. C. 552.

What Swift says, that the St. of limitations must be pleaded to actions of assumpsit, is doubtful. 2 Ser. 215.

In Conn. as well as in Eng. if an action is brought on a private Stat. it must be set out like as a specialty. The C. S. rule prevails in this case.

A public Stat. when required to be pleaded need not be recited. Judges take notice of its provisions ex officio. Secus, of a private. Public Stats. must in some instances be counted upon, but need not even then be recited - post p. - 1 Bac. 38. 4 Bac. 655. 4 Co. 76. 10 Co. 57.

But it is said that if one does recite a public Stat. even the unnecessary, a misrecital in a material point is fatal, even after verdict. 4 Bac. 658. Cro. E. 245. 236. 19 Vin. 508. Doug. 90. Comp. 474. Esp. 134. 5. S. Ray. 382. Cro. E. 232. 2 Mod. 99. - Not so (says Hobart) if misrecital is in an immaterial part. Cro. E. 376. 136. 522. 4 Bac. 659.

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I think Holls rule is correct - that generally a misrecital of a public Stat. in a material or immaterial part is not fatal unless the party pleading, ties himself up to the Stat. as recited, by the words, "contra formam Statuti praedicti" generally. Judges take judicial notice of the true Stat. Misrecital I suppose is surplusage. 2 M. & S. 16.  
1 S. 2. May. 382. Plow 79. 84. Cro. 6. 233. Freeman 211.

This seems to be the rule tho the misrecital is in a point immaterial. Doug. 90.2, 2 Mc. N 516.

Misrecital of a private Stat. is not fatal, after ver-  
dict or on demurrer. In both cases the Stat. is taken to be as  
pleaded. For the judges are not supposed ex officio to know.  
The Stat. sh.<sup>d</sup> then be denied by "nol til record" or the vari-  
ance specially shown by pleading - or the adverse party  
may pray over & then demur. It is just like the misre-  
cital of a deed or bond which the Ct. regard not till plea  
did. Hence advantage cannot be taken of such mis-  
recital by motion or arrest of Judg.<sup>t</sup> because the Ct. do  
not know what the Stat. is. 4 Bac. 658. 2 M. & S. 517. 2. Ray, 382.  
2 Mod 241. 1 Sid. 356.

Exception to the rule that a public Stat., need not be pleaded. In Eng. even a public Stat must be specially pleaded, when to be improved to defeat a specialty. Because the law too much regards specialties to have them defeated without good reason. E.g. Upon an action of <sup>debt</sup> ~~assumpsit~~ <sup>debt per Eng.</sup> if one would avail himself of an usurious or gaming contract he must specially plead the Stat. w. usury or gaming. He can not plead non est factum & give usury in evidence.



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support it. The true reason for the last rule is that pleading the Stat. contradicts the general issue, for it admits the making of the bond. 5 Bac 419. 5 Co 59. 6119. 3 Falk 391. pl. 7. 760. 72.

The rule is different in Conn. ...

In declaring on a private Stat., it is necessary to recite it substantially, tho not verbatim. 4 Co 78. 2 Hob. 466. 2 Mod 57.

If a Stat. is part public & part private, there is no need of reciting the public part. 10 Co 57. 760. 227.

It is now necessary to recite the title or preamble of any Stat. as they compose no part of the Stat. It is usually done in Conn. but it is foolish for a lawyer unnecessarily to hazard a misrecital & cumber the records. 1 Conn. 230. 3 Co. 33. 4 Bac. 555. 658.

As the recital is unnecessary, it was once held if the misrecital of the title of a public act was not fatal on demurrer, it being more surplusage. But it is since decided otherwise; for by the recital one ties himself to it as recited. 2 Ray. 77. Hardw. 324. 4 Bac. 658. 6 Mod 62.

In Eng. the recital of a Stat. where recital is necessary must contain its date & the place where enacted, otherwise it is ill on general demurrer. 1 Com 231. 4 Bac. 657. 2 Hawk. 246. Crof. 211. 19 Vin. 507. Cro. E. 232. Comf. 474.

A misstatement of the date & place is also fatal.

Declarations &c. on private Stats, null till record may be pleaded by the adverse party. 4 Co 76. 2 Mod 57.

But this cannot be pleaded to a public Stat. for it is not a *que. of fact*, - The Ct. determine whether there is such a Stat. 4 Bac. 655. 8 Co. 28. Cro. E. 355.

## Municipal Law.

As a general rule, in declaring upon a public Stat. it is not necessary for the plff to count upon the act. He need only plead it, which we have already seen is nothing more than to state the facts which bring the case within the Stat. 19 Vin 503. 1 Bac 38. Carth 382. Cro E. 601. 1 Com 230.

### Three exceptions to this rule.

1<sup>st</sup> If there is a remedy at C. L. or by Stat it is said to be necessary; otherwise it is not known what remedy is pursued; or rather I apprehend the C. L. w<sup>th</sup> be presumed to be pursued. There are many cases of this kind. Bacon in his title of pleadings, incorrectly lays down a rule contrary to this here given. He uses "recites" where he should use "count upon". 1 Com 230. Lintw. 584. 4 Bac 18.

2<sup>d</sup> So in actions upon penal Stats, the Stat. the public must be counted upon - i.e. in all cases in which penalties are inflicted & actions or prosecutions brought to recover or enforce them. (He must conclude "contra formam statute", & plead the facts, must be so specifically stated that they will clearly come within the Stat. referred to. Plow. 206. 1 Bac 38. 19 Vin 505. 7 T. R. 521. Kel. 32. 2 East 333. 1 Vent 103. 6 East 126. 2 Hoar. 356. 75. 13. 2. C. 25. 116.

3<sup>d</sup> If a public Stat. give a new action, i.e. one unknown at C. L. it is necessary to count upon it. The rule says it must be recited, but recital is not necessary the formerly thought so. - e.g. when an action is brought on the Stat. to recover a place wasted, there being no former action at C. L. adapted to the case. 4 Bac 656. 19 Vin 504. 2 East 334. 2 Hurl 121. Salk 205. Hall 634. 2 East 334 341.



## Municipal Law.

But where the St. extends an old remedy to a new case the general rule holds, that pleas must not count on the Stat. - e.g. Stat 4 Edw. 3.<sup>d</sup> (called Stat. "de bonis asportatis", & sometimes, de arboribus &c.) giving an action of trespass to exec.<sup>rs</sup> for goods of the testator carried away in his life time - Here (trespass being a C. & L. action) no new form of pleading is necessary. 4 Bac 655. 19 Vin. 503. 4. 1 Com 230. Dy. 83. b. 85. a. b. 2 Bac. 439. 445.

A general rule, that counting is not necessary on public Stat. remedial (i.e. beneficial) when no new action is given. As if a Stat. creates a right, or enjoins a duty & gives merely damages for its violation or neglect. So where it does not expressly give any remedy but leaves the C. & L. to enforce its provisions. The C. & L. furnishes the action. 3 Co 7. b. Leath. 382. Salk 212.

If one Stat. prohibits the act, & another inflicts the penalty, both must be counted upon, even tho public. 2 East 333. Osb. 135. Plow. 206. 19 Vin. 505. 4 Bac. 556.

An offence may be laid in one indictment to be against C. & L. & the Stat. law (where the remedy is cumulative) but this is done by different counts. If one then fails, the other may stand. Black 235.

If a temporary penal Stat. having expired, is continued by a subsequent one, & counting upon the law is necessary, it is sufficient to count upon & former only, for that is the law. 4 Bac 655. 638. 2 Stra. 1066.

The words 'contra formam statute' may be rejected as

## Municipal Law.

as surplusage in an indictment &c if the offence is at C.S. only. 5 T.R. 162. 8 T.R. 362. 3. 2 Hawk. C. 25. §. 115. 6.

Exceptions in the enacting clause of a Stat. must be negatived in a declaration or complaint upon the Stat. & the omission to do it is not cured by verdict. But those in a separate substantive clause need not be negatived. (The Deft. may take advantage of such clause, if he come within it, by way of defence.) 1 Burr. 153. 5 T.R. 82. 1. T.R. 141. 5 T.R. 559. 7 T.R. 27. 8 T.R. 542. 4 Bac. 650. 656. pl. 14. 5. 1 Com. action on Stat. A. 2. 2 Ray. 120. Flow. 410. Doug 331. 1 Burr. 148. 1 East, 646. 2 M. & N. 544. 1 Lev. 26. Stra 497 [Ray. 65. Esp. 300. infra.]

The reason of the distinction is that in the former case the exception enters into the description of right or offence - in the latter not, but is mere matter of defence for the Deft. - ex. of the former. We have a Stat. prohibiting the doing of any secular business on the Sabbath - works of necessity &c. excepted. Now in an action on this Stat. the plff must aver that the Defts work was not of necessity &c. - But he need not aver that not a month has yet elapsed, the extent of the time for a prosecution on the Stat. by its enacting clause. Ray. 65. Esp. 300. -

When there are two subsisting remedies, one at C.S. & one by Stat. either may be pursued. The Stat. remedy is cumulative. 2 Hawk 302. note. Leach 235. 2 Burr. 799. 803. 805. Cowp 648. Salk. 45.

And if the plff in this case pursues the Stat. remedy & cannot support his case under the Stat. he may



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may in the same suit resort to the C. S. remedy & recover if the case is supportable at C. S. Moo. 750. 2 Bl. R. 400.

The same rule holds in public prosecutions. 1 How 211. 2 How 302. 356. 2 H. 138. Salk 212. 2 Hale 191. - Formerly held that it did not. Cros. 231. 307. 497. 5 Co. 99. 2 Hale 71. 170. 1. 2 Mc. 493. 5. 5 T. B. 169. 5 Bac. 419. 1 Sid. 421.

If that which was no offence at C. S. is made illegal by Stat. & a particular mode of prosecuting for it (or a particular remedy) is pointed out in the Stat. that mode only, it is said, can be pursued, all other modes are excluded. Exam. The Stat. provides for prosecution by information - still indictment will not lie. 4 Bac 641. 654. Cro. J. 644. Salk 45. 7 Co. 36<sup>a</sup> 4 Burr. 2323 2 Burr. 803. 5. 834. 6. 1188.

This rule is to be taken with qualifications - Indeed it holds only in two classes of cases. - 1<sup>st</sup> When the particular mode of prosecuting is prescribed in the prohibitory or enacting clause - 2<sup>d</sup> When there is no prohibitory clause, as if the Stat. enacts that "whoever shall do such an act shall be punished thus & thus. In these two cases the particular mode must be pursued. 1 Burr 544. 5. 4 T. R. 205. 2 How 302.

In the first class the mode of prosecution is incorporated with the description of the offence. But on the other hand if the particular mode is prescribed in a separate substantive clause the rule does not hold. Then any proper C. S. proceeding may be pursued. 4 T. R. 205. 2 How 302.

So if that which ~~was~~ is prohibited by Stat. was

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before punishable by a C. S. proceeding, the C. S. remedy and mode of proceeding may be pursued, tho the Stat prescribes another particular mode - the latter may also be pursued. The Stat. sanction is cumulative. 2 Burr. 803, 805, 834.  
4 T. B. 202. 2 Hawk 302.

If a Stat. creates a right or prohibits an offence & gives no remedy or sanction, the C. S. will lend its aid to enforce the one, & punish the other as a misdemeanor. If in such case a civil remedy is to be sought, it is by action "on the Stat." - The right to be enforced is given by the Stat. - the remedy is furnished by the C. S. - If the offence thus created is to be punished, the offender is prosecuted as for a misdemeanor, in violating the wholesome regulations of the State. 2 Inst 159. 55. 74. 3 Lev. 240. Doug. 425. 19 Vin 512. 518.  
Cro E. 655. 4 Bac 653. 10 Co 75. 6 Mod 26. 1 Com. 229. 230. 10 Par. 544.

So to obstruct the execution of powers granted by Stat. is an offence at C. S. & the indictment need not, & ought not to conclude "contra formam statuti". Suppose a Stat. gives to persons, a power to lay out roads, &c. and they are opposed in the execution of the power, an indictment will lie as such opposers, but not for a breach of the Stat. -

### Who may prosecute on penal Statutes.

It is a general principle of C. S. that a public offence is not to be prosecuted by an individual in his own private right or capacity. The public is the party injured & therefore entitled to the remedy - or in eng. the "King" - 2 Hawk 255. folio. 4 13 C. 2. 5. 6. 7.



## Municipal Law.

In Eng. indeed private persons do prosecute offenders for the King & in the Kings name, even where no part of the penalty goes to them - & even by indictment - for costs. it seems in most cases. They are then called prosecutors or informers. 2 F.R. 47. 190. 198. 205. Leach 71. 242.

Any individual does it even in case of felony. The practice is never allowed here. Leach 242. 257. 233. 231. 229. 223. 198. 192. 260. 3 Bac. 568. -

Observe I gave the C. S. custom - But Stats may enable individuals to prosecute according to prescribed forms enacted by the Legislature.

There is however a mixed species of prosecution entirely sui generis - partly public & partly private, called Qui tam from the words of the process, "qui tam pro domino Rege" &c. 3 B.C. 162.

A qui tam prosecution is one brought partly at the suit of the King & partly at the suit of the individual prosecuting. for both, 3 Hawk 264, fol. 4 B.C. 308. 1 Bac 37.

These are by action or information.

Qui tam actions are carried on by civil, qui tam informations by a criminal process. The form then determines to which it belongs. 3 B.C. 161. 2. 4 B.C. 308.

Our qui tam complaints accompanied with a writ with process, are properly qui tam informations.

An action brought by an individual in his own right on a penal Stat. is a civil suit. Comp 232. 4 B.C. 756. 751. 1 Inst. 125. 3 F.R. 448. ~ F.R. 257. Kirk 172. 1 Inst.

Qui tam actions are generally brought on penal Stats.

## Municipal Law

to recover a penalty or forfeiture of some kind. Indeed as understood at present they are treated & considered as creatures of penal Stats. 4 Bl. 308. 1 Bac. 37. Finch, L. 340.

They are not known at C. S. the actions *qui tam pro domino rege quam seipso* were known it seems in certain cases at C. S. - 2 Hawk 377. 16 Cl. 1. pl. 1. 1 Vol R. 78. 19. Cro. E. 817. Cro. J. 360. 1. 532. 3.

A popular action is one given to any person who will sue for a penalty incurred by the violation of some penal Stat. - Called popular actions because given to the people generally. 3 Bl. 160. 2. 2 Bl. 437. Jac. S. Dict. 1 Com. 229.

Sometimes in a popular action the whole penalty is given to the prosecutor - sometimes a part. 2 Hawk. 265. fol. 3 Bl. 161.

A *qui tam* & popular action are not specifically the same. A popular may be not *qui tam*, for the whole penalty &c may be given to the prosecutor. And a *qui tam* may be not popular, for the right of suing "*qui tam*" &c may be confined to the party grieved by the offence. 1 Com 229. contra 2 Hawk 265. 1 Bac. 37 say it is in this case a *qui tam*.

A *qui tam* must be brought in the name of the King - a popular need not be: & when the whole penalty is given to the prosecutor, it is not necessary to join the King or the public.

If an individual is civilly injured by an offence, prohibited by Stat. he may have his private



## Municipal Law.

remedy by civil action on the Stat. The Stat. implicitly (when not specifically) gives a remedy. As if a Stat. should make a breach of private trust a misdemeanor. 4 Bac 653. 2 Inst. 55. 74. 10 Co. 75<sup>b</sup>. Com Di Act<sup>n</sup> on St. H. 1.

And whenever a Stat. prohibits or commands a thing for the advantage of an individual, he has an action on the Stat. for an injury occasioned to him ~~for~~ by its violation tho the Stat. is penal. & no remedy expressly given to him. He may have a *qui tam* action in these two cases. e.g. Supposed a Stat. prohibiting private nuisances. *vid page* 4 Bac 653. 1 Com. 229. 230. 6 Mod 267.

When a Stat. inflicts a penalty &c. on any one for dispossessing another of his right or interest (without appropriating it) he who is injured by the violation of the Stat. (not the public or king) shall have the penalty &c. and an action upon the Stat. at Com. law to recover it. e.g. where for not "setting out tithes" the Stat. gave a forfeiture of tithes their value. 4 Bac 653. 3 Lev. 295. Co L. 159.

### When *qui tam* prosecutions will lie.

If for an offence immediately injurious to & public only, a Stat. gives a penalty, or part of a penalty to the individual who shall prosecute for the offence any person may have a *qui tam* action &c. Such is the Stat. vs the exportation of wool &c. in Eng<sup>d</sup>. 1 Bac 37. 2 Hawk 205. fol. 373 stare. 1 Com 227. 2 Com 518. 4 Co. 13. Dy. 95. Com. action on Stat. H. 1.

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So if a sum certain is given to the prosecutor and a fine to the King or public, a *qui tam* will lie. *Idem.*

But unless such penalty &c is given, (as in last rule), no individual can sue for such offence. The reason of this distinction is manifest; in this last case the individual has no interest or right, in the other he has. 1 Bac 37 n. 2 Jon. 234. 2 Hawk <sup>285</sup> 377 fol.

But if a Stat. prohibit an offence immediately injurious to an individual as well as to the public, & expressly gives the individual injured either a remedy &c or damages, he may, & it is said ought to bring a *qui tam* action. E.g. Stat. v. Scandalum magnatum. So if Stat. prohibit private nuisances. - The rule is said to hold tho no penalty &c is given to him (- especially if the King or public is entitled to a fine - & it seems tho no fine is given to the King, but the public only.) This rule grows out of a former one (page ) that the Stat. impliedly gives a remedy. &c 1 Bac 37. 1 Com. 228. 9. 2 Hawk 377. 4 Co 13<sup>n</sup>. 12 Co 134. Dy 159<sup>b</sup>. Crof. 104.

If a Stat. expressly allot a penalty to the party grieved by the offence, he may sue for it without joining the public. 1 Com 229. act<sup>n</sup> on Stat. F.

In Conn. *qui tam* actions are brot on the Stat. v. forgery, theft, breach of peace, &c 2 Cow 183.

Generally when a fine &c is given to the public or King, & a civil remedy to the party injured by an offence the fine is inflicted of course, on conviction in a civil suit, tho the individual sued in his sole right only.



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as the capiator pro fine at C. S. in trespass vi et armis. Here the Judge inflicted a fine on the Deft, & held him till he paid it. This is taken away by Stat. 5 Wm 4 Mary. 4 Bac. 11. 5 Bac 191. 3. 2 Bac 506. Salk 636. Carth 390.

According to our practice "fine" &c is not inflicted in such cases unless the p<sup>l</sup>ff in the civil suit moves for it. As on our Stat. v. Defamation - breach of peace - vexatious suits &c. Indeed I believe the rule is of late about fallen into disuse. Stat. 141. 336. 7. 429.

If no form of action is prescribed for the recovery of the Stat. penalties, debt is a proper & the most usual action. 4 Bac 650. Popl. 175.

I am not sure that Indict. assumps. is proper tho so decided in St London Co. Conn. in an action on the Stat. v. usury. Esp. 7. 2 Sw. 252. Carth 92.

If a penalty is given by Stat. partly to the King & partly to the prosecutor, the King may prosecute for it. He then has the whole. It is the same in this Country *mutatis mutandis*. 3 Bl. 162. 2 Hawk 268. fol. 275. or 392. 3 Inst 194. 11 Co 65. 66. 7 T. R 506.

A bona fide conviction or acquittal on a *qui tam* prosecution, by action or information is a bar to any other (even a public) prosecution for the same offence. But it must be a bona fide & not a sham prosecution (as by a friend) to screen the offender. And so converso a conviction &c on a public prosecution is a bar to a *qui tam* prosecution. For no person shall be tried twice for the same offence. 3 Bl. 262. 2 Hawk 276. fol. 480. 2. 660 65. 66. 1 Bac 41. 1 Con 229.

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So the pendency of a *qui tam* action &c. may be pleaded, it is said, in "bar" of a subsequent prosecution &c. (ut supra) I think it may not be pleaded in bar, as Bacon says, but may be in abatement\*. Though the whole term is in law but one day, yet if one pleads that another action has been commenced the same term, he must state on what day. (1 Bac 41. Cro. E. 261. Hob. 209. 1 Mol. R. 49. 134. 2 Hawk. 275. or 391. fol. 3 Burr. 1423.

A person claiming a penalty or sum of money under a penal Stat. giving it to any person who will sue for it, has no right attached in him under the Stat. till the action is bro't. But by commencing an action he acquires an inchoate right not (consummated till judgment. The penalty in this case is like property unoccupied in a state of nature. 1 Bac. 37. 2 Hawk 275. or 391. fol. 3 Inst. 194. 2 H. Bl. 310. 11. 2 Lev. 141. Sta 1169. 3 Burr 1423. 2 Bl. 437.

As to remedial Stats. the rule is otherwise. Then the party has an inchoate right of action from the time the injury was committed. 2 H. Bl. 311.

Hence when a popular action is given by a penal Stat. the King may bar the prosecution by releasing the whole penalty, or by a pardon before the action is bro't. 2 Hawk 275. or 392. fol. 3 Inst. 194.

But after the action &c. is bro't the King can release only his part of the penalty. 2 Bl. 437. Cro. E. 138. 1 Co. 65. Hutt. 82. 1 Com 229. 3 Inst. 194.

Nor can he then in any way discharge or



## Municipal Law.

Suspend the suit as to the other part. 2 Hawk. 275. 6 or 392. fol.

The Parlm<sup>t</sup>. it is said, can release the whole even in this case. But I think it has no more right to do so, than to deprive a man of his property. It may indeed repeal the Law. 2 Bl. 437.

But it seems that the King cannot even before the action is brought, bar the suit of the party grieved by the offence where the penalty or part of it is given to him - for as to him the Stat. is at least to a certain degree remedial. This right commences with the offence and is antecedent to the action. 2 Hawk. 276. or 392. fol. May 100. Moore 58. 2 H. Bl. 311.

The prosecutor in a popular action it seems might at C. S. release his part of the penalty, after conviction; before the conviction he had only an inchoate right. 2 Hawk 276. or 392 fol. 2 Rol. N. 33.

The consequence of this rule was that offenders w<sup>t</sup> often escape the punishment of the law. For some find w<sup>t</sup> prosecute & after conviction give a release. Hence by Stat. 4 Hen. VIII. it was enacted that no covinous recovery in a popular action, shall be a bar to a subsequent action or brought by another individual. And no release pending the action, shall be of any avail in such cases. This Stat. is operative in this Country. 2 Hawk. 276. or 392. fol. 3 Bl. 162.

I think a covinous recovery, or release would be void at C. S. as fraudulent. Burr 395. 3 Co 77. vis at tit. vacant  
And by Stat. 18 Eliz. the plff may not compound

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the prosecution at all till after answer made in Ct. - nor then without leave of the Ct. on pain of the pillory &c.

1 Bac. 43. 2 Hawk. 279. or 397. fol. 1 Bos. & P. 18. 5 T.R. 98. Stra. 167.

And even at C. L. a bona fide release would not bar the King's right to prosecute; tho it would any individuals if given after conviction. (ut supra) 2 Hawk. 275. fol. 11 Co 65. b. 66. a.

Suppose the prosecutor practices fraud to defeat public prosecution - as by delay that the Stat. of limitations may bar it, & then withdraw - would he not be punished for a misdemeanor? -

If the p<sup>pl</sup> in a popular action &c die, release, withdraw, or suffer a nonsuit, the public may proceed in it - or commence a new prosecution. The rule is otherwise when the action is given to the party grieved.

2 Hawk. 275. or 392. 3. fol. 11 Co 65. b. 66. a. 5 Co 48. b. 3 B.C. 162.

If several joint offenders are convicted in a popular action, only one penalty is inflicted on the whole. It is otherwise if several are convicted on a public prosecution upon a penal Stat. The difference is said to arise because in the former the penalty is a satisfaction - in the latter a punishment. Hence it to be because the former action is founded on debt & there may not be joint debtors, the latter is on crime & there may not be joint criminals. Moore 453. May 60. Cro. E. 480. Salk 182. 4 T.R. 309. 4 Bac. 653. 4. Bul. N.P. 189. Cowp 610. 4 Burr. 2026.

One act may constitute several offences. Several acts may constitute but one offence. In the latter case



## Municipal Law.

only one penalty can be recovered. e.g. In Eng. a Baker sold bread several times on a Sabbath, & it was held that the whole constituted but one breach. Cowp 640.

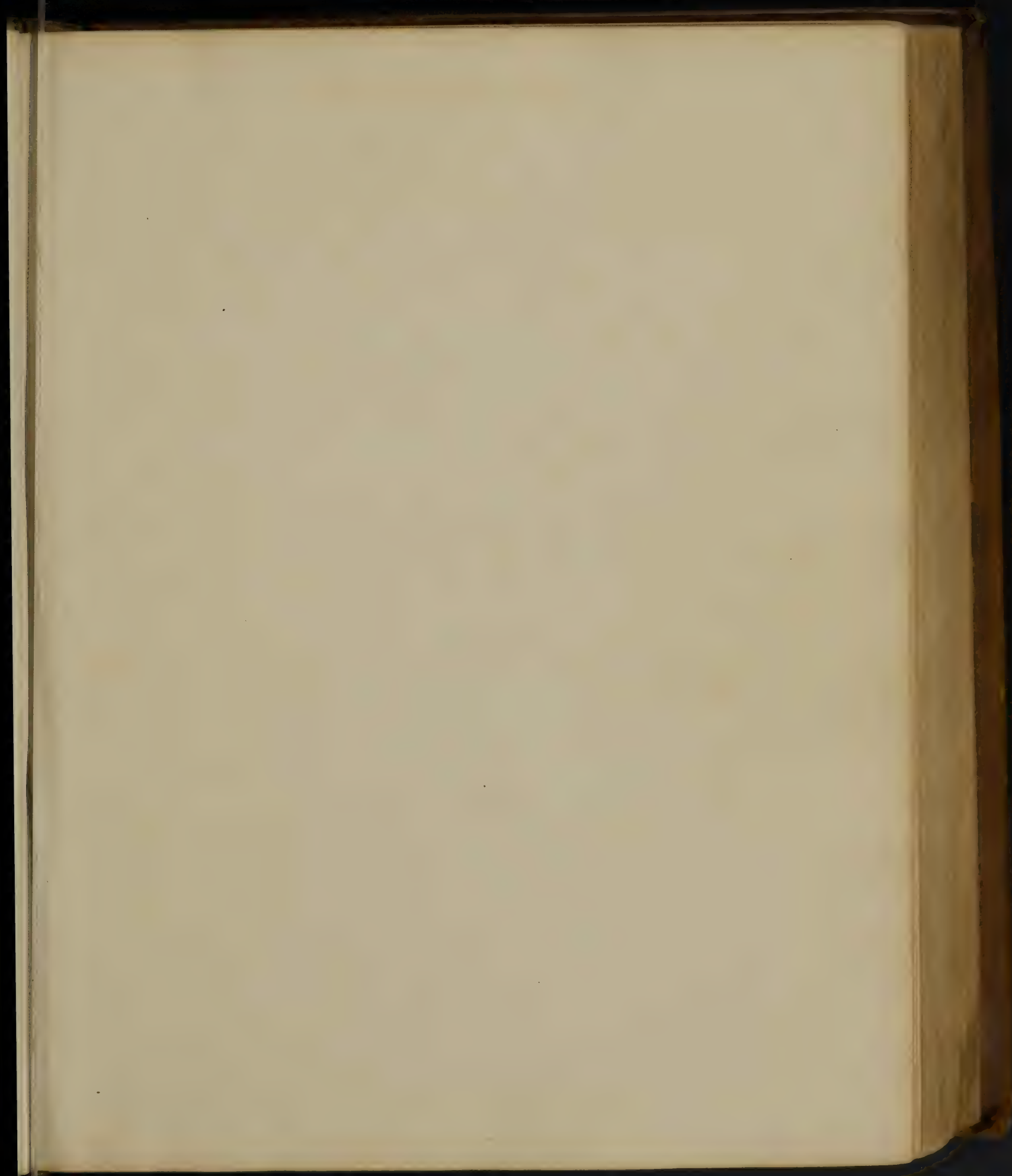
One act may constitute different offences, & a punishment for the lower is then no bar to a prosecution for the higher. -

Distinction in common acceptance between Pen-  
{alty - & forfeiture or fine - 1<sup>st</sup> To an individual. 2<sup>d</sup> To  
Public. (Quere.) 4 Bac. 653. 4.

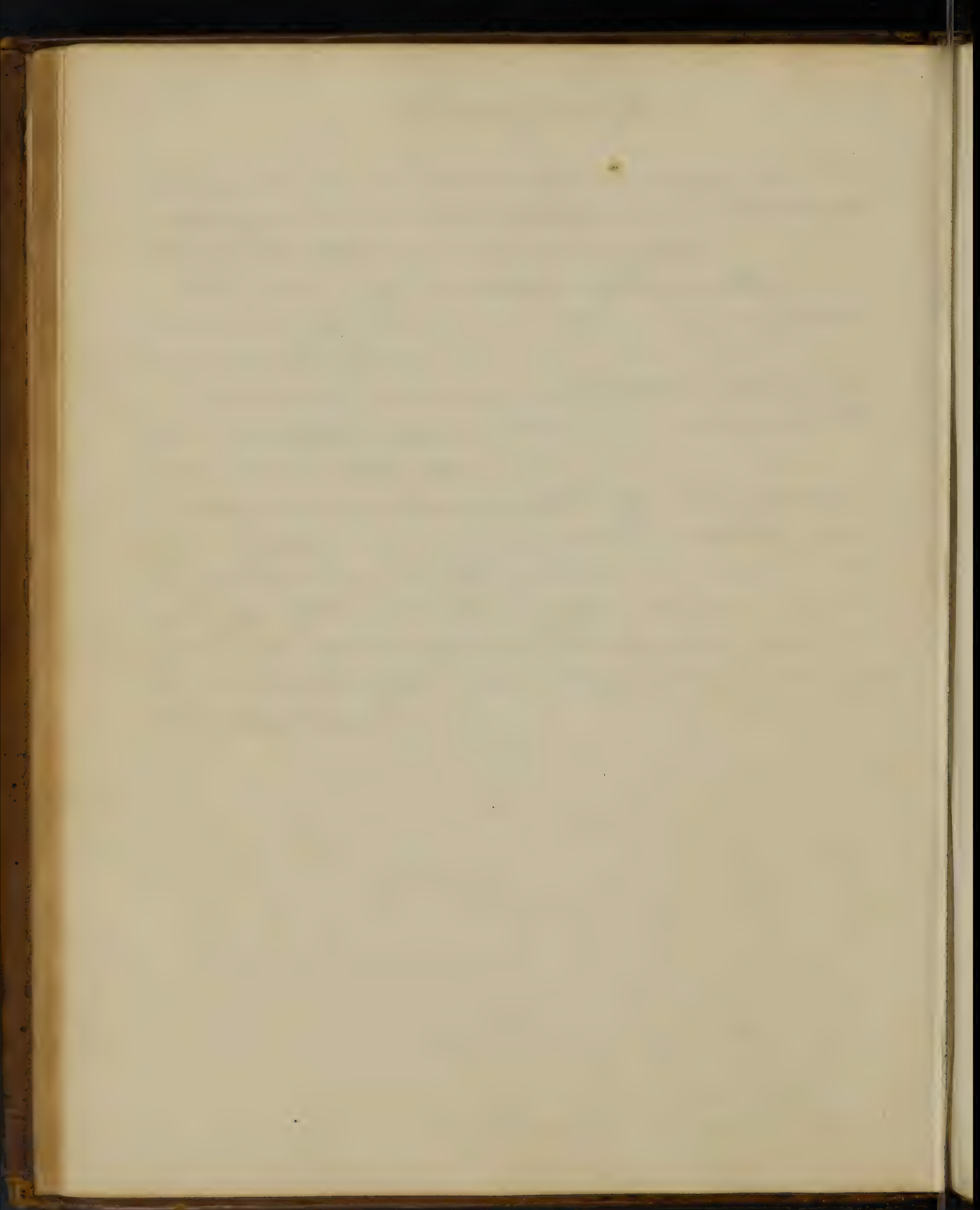
In popular actions, the p<sup>l</sup>ff in Eng. is entitled to no costs, unless they are expressly given by the Stat. for the b. & allows none. The Stat. of Gloucester gives costs only where the p<sup>l</sup>ff recovers his damages. But in a popular action, the p<sup>l</sup>ff has suffered no particular damage.

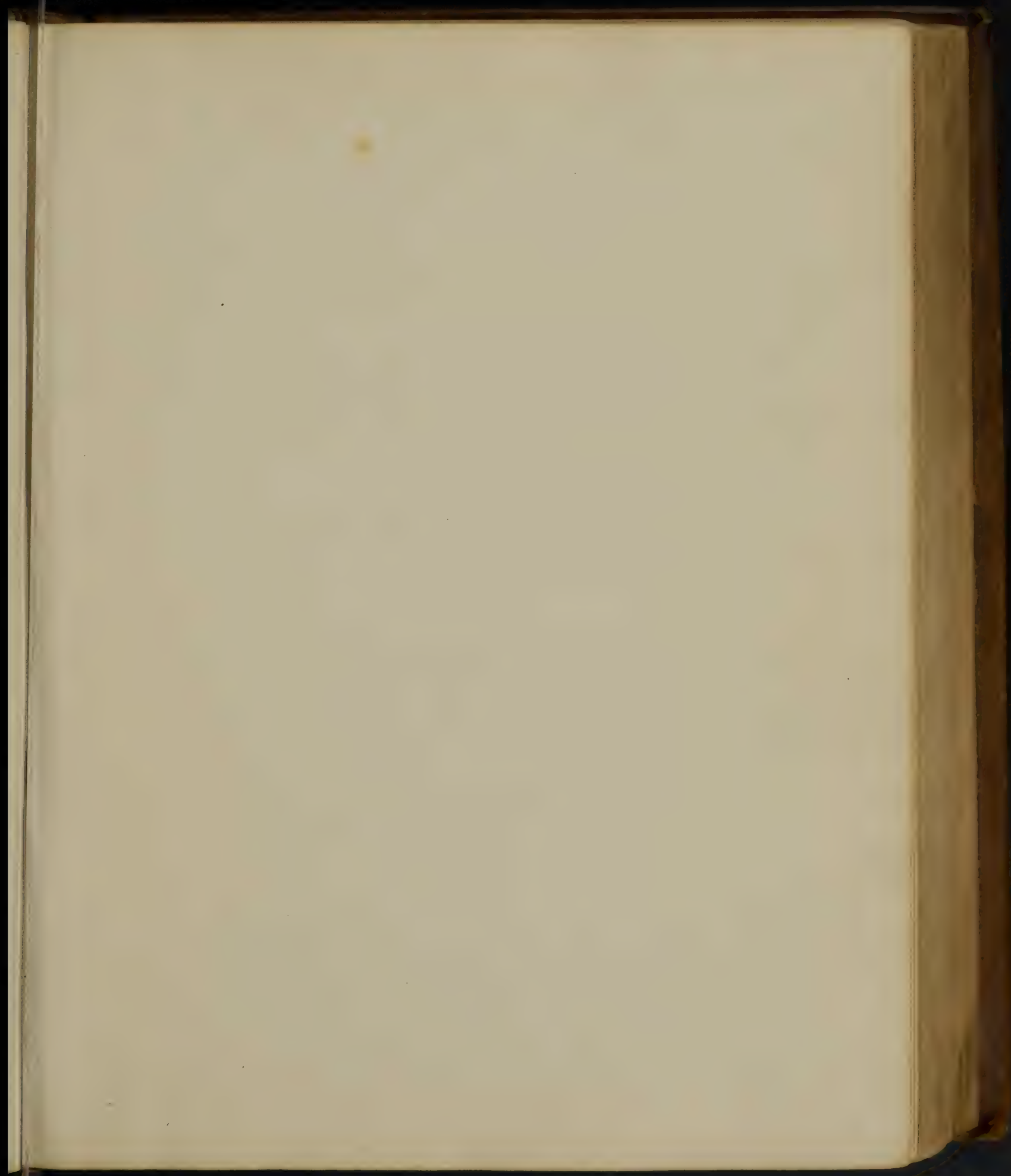
1 Bac. 42. 511. 519. 2 Keb. 781. Rot 574. Salk 206. 1 W. Bl. 10. 2 Hawk 274 fol.

Hullocks 19. 200. 17. 201. -

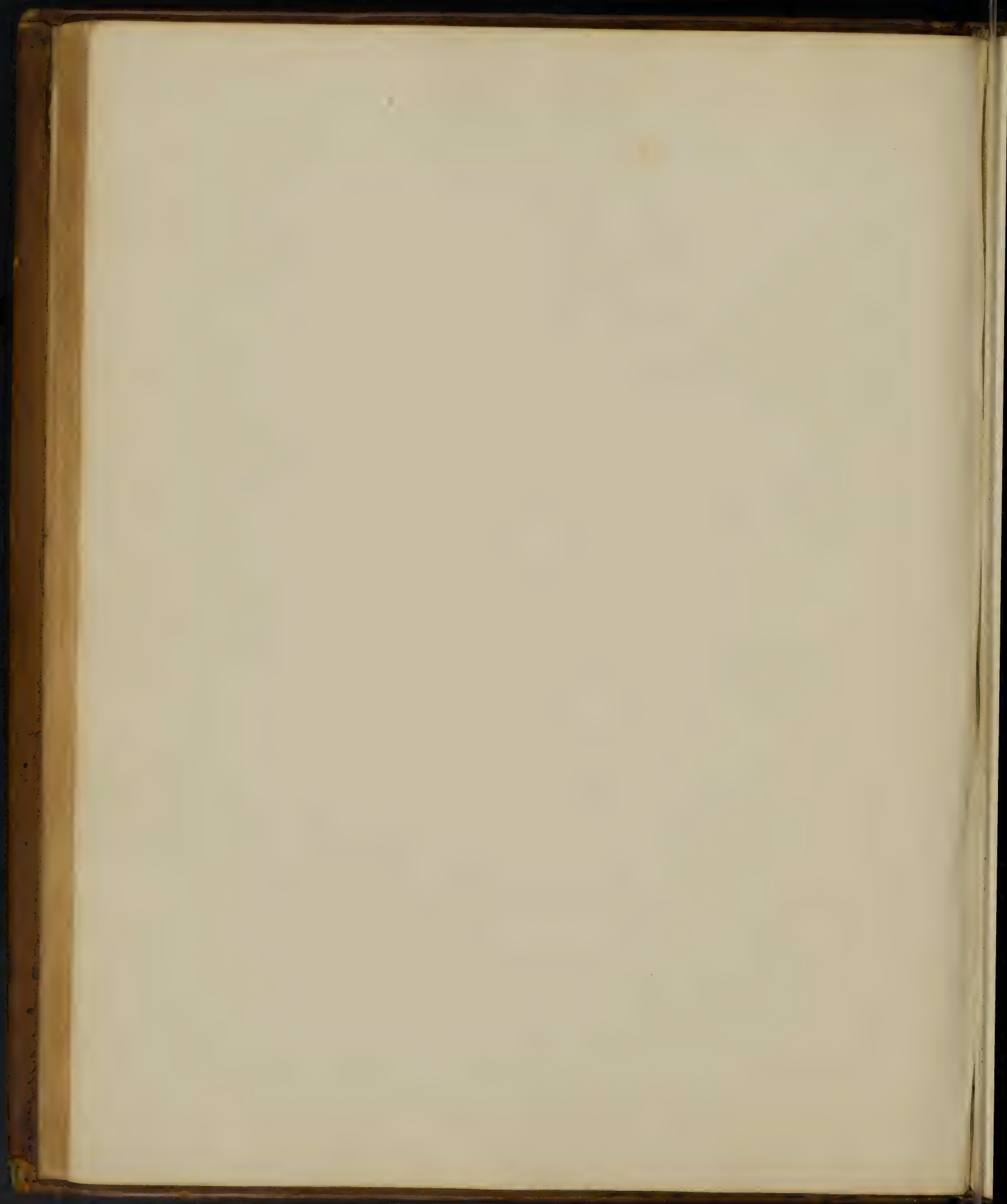


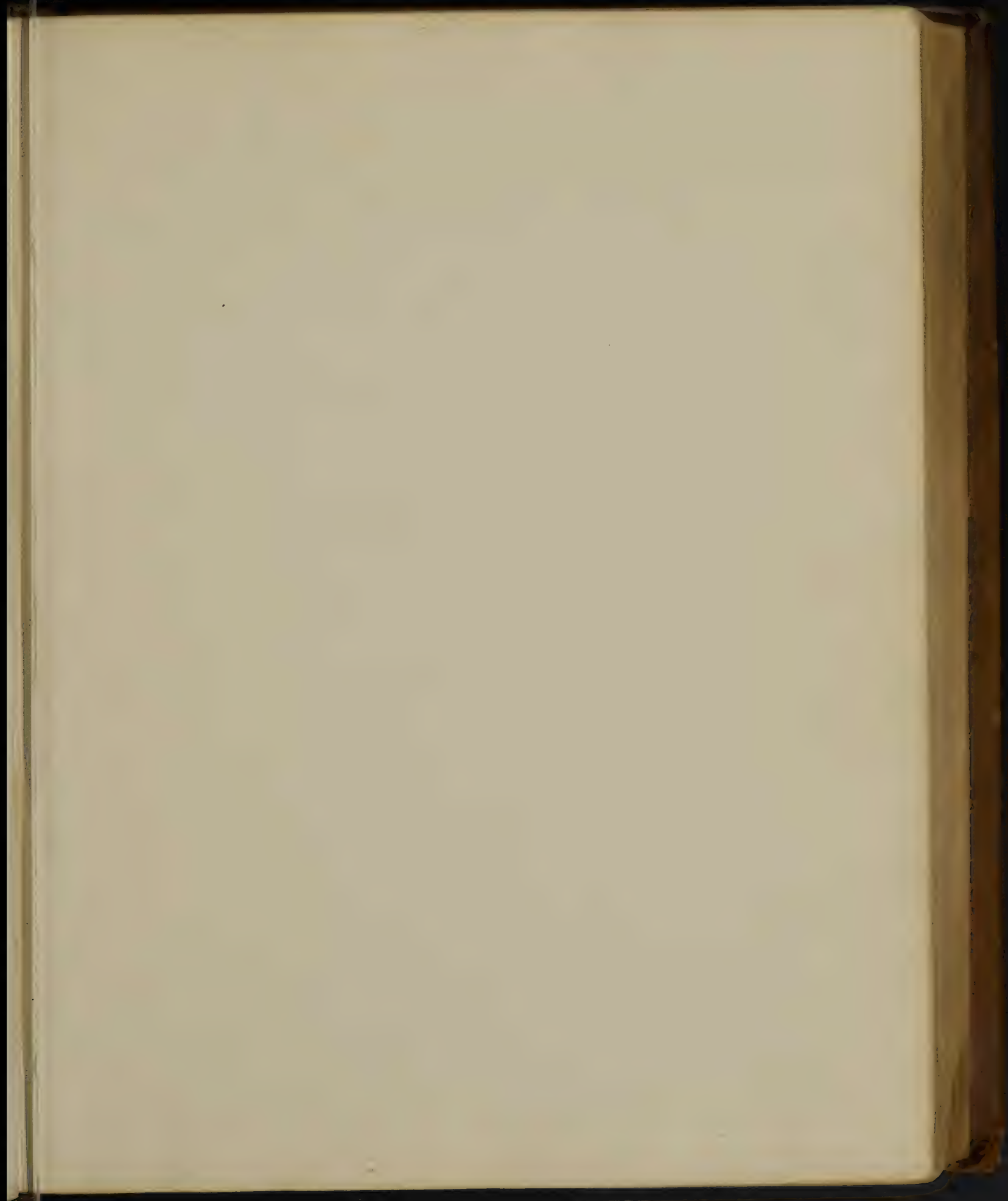




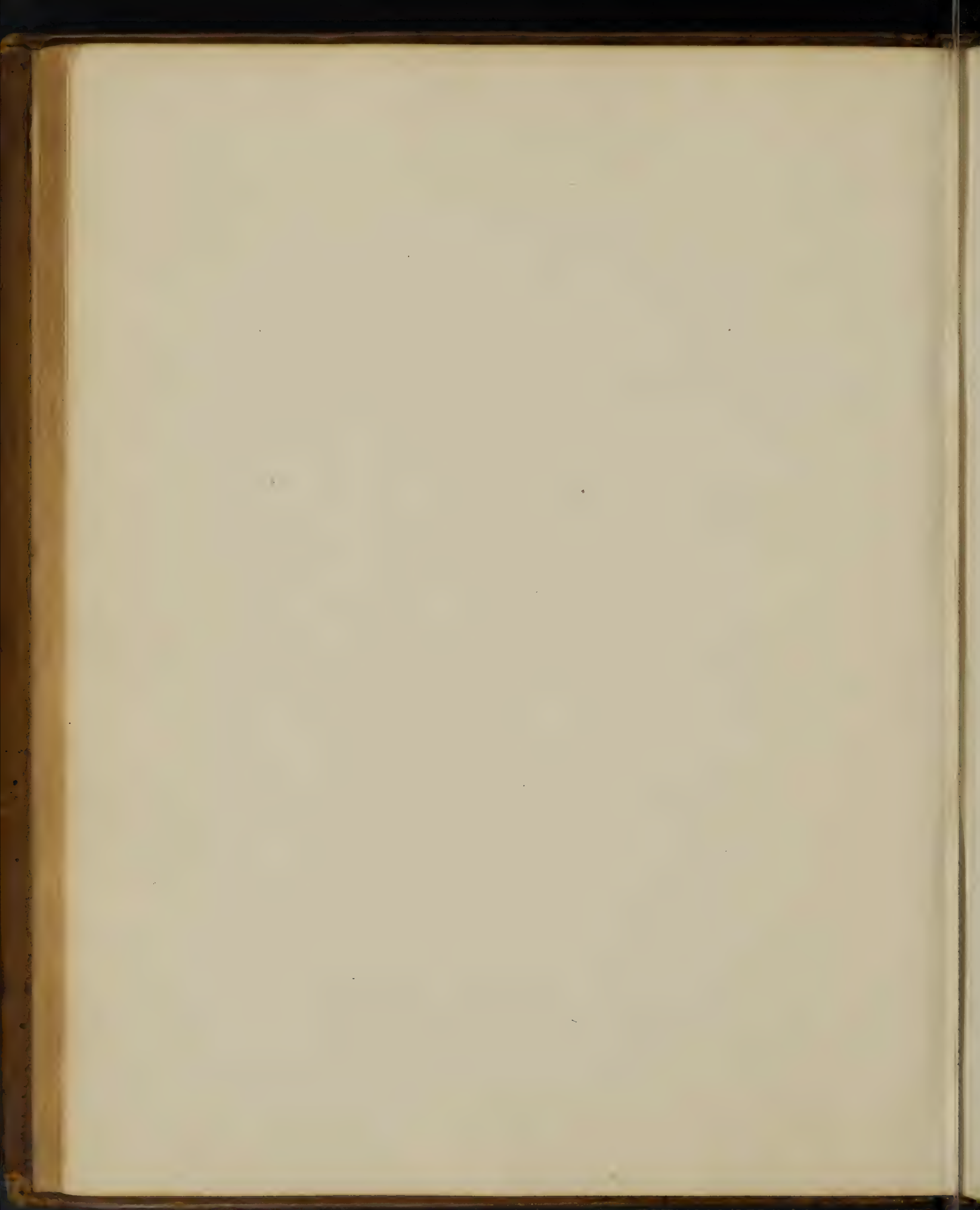


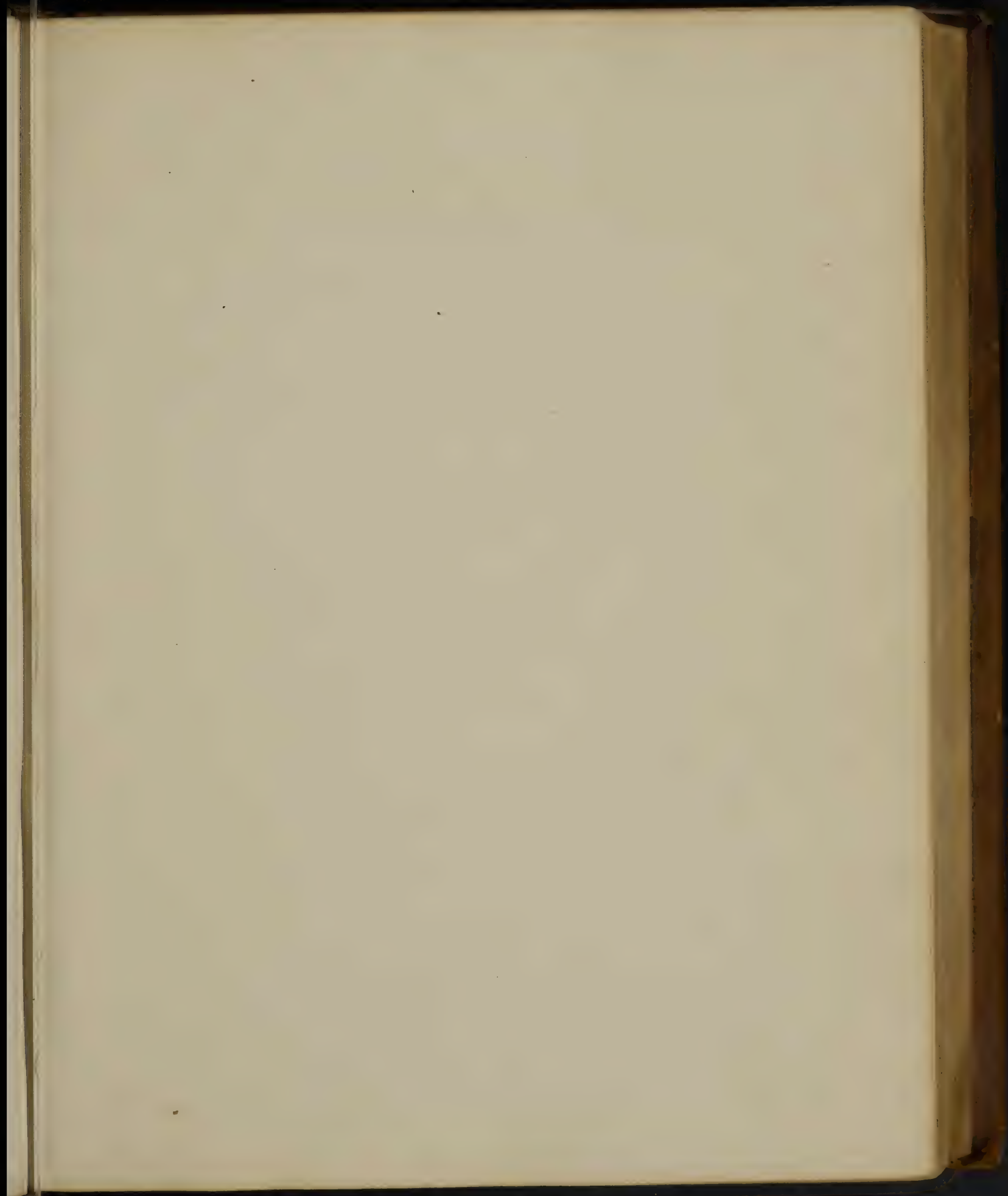




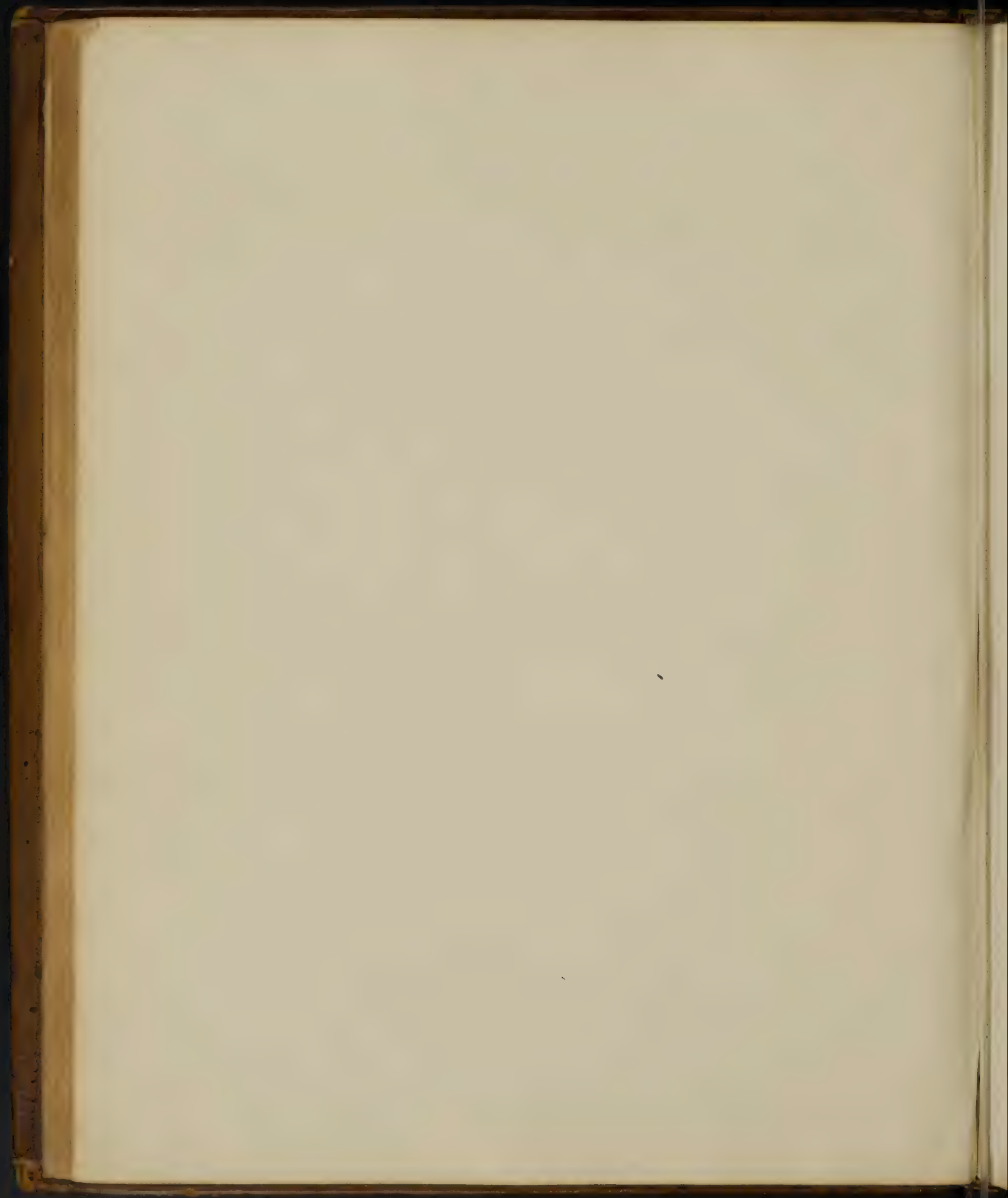


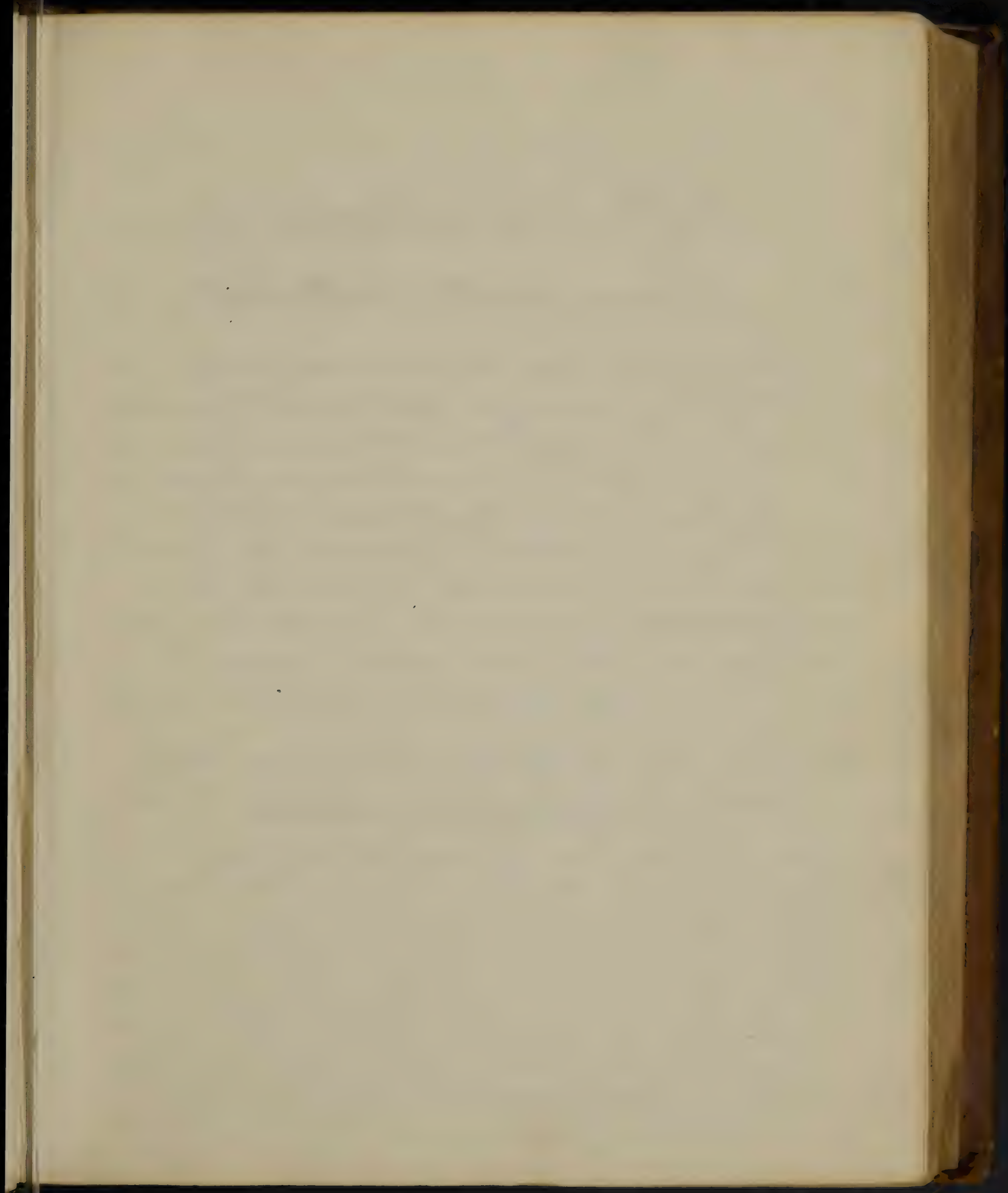




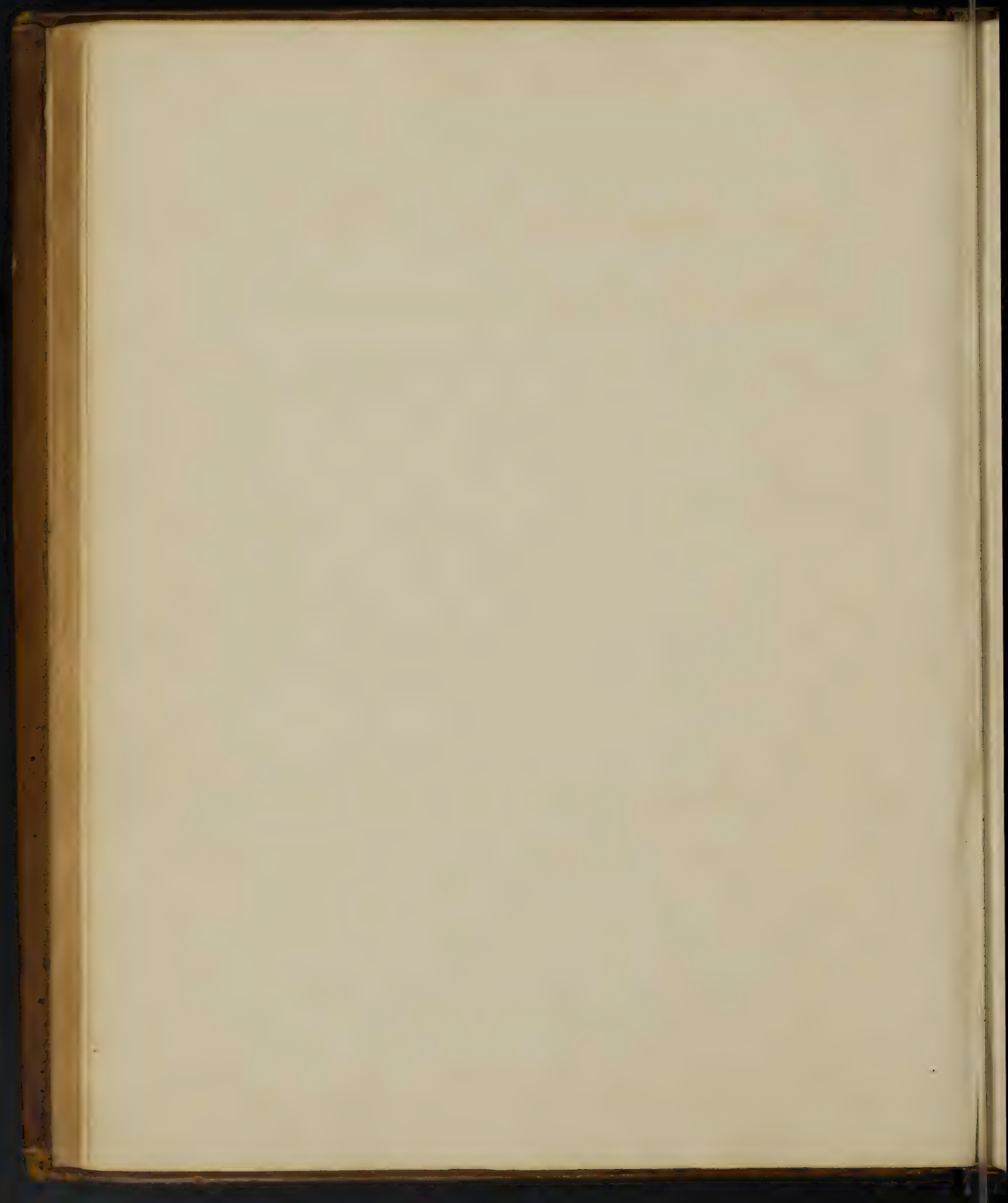












# Of Husband & Wife.

## Of the Rights & Duties generally.

Marriage, which is the institution of a relation between husband & wife, is regarded by the C. L. & our own as a civil contract, & the requisites are the same as for making any other contract - scilicet -

1. That the parties be legally capable of making it
2. That they be willing to contract or marry, &
3. That they actually do contract. And when a contract is thus executed the relation commences. 11 Bl. 433. 422. Fulk 120. 437.

For many purposes in law, the husband & wife are considered but as one person. 11 Bl. 422.

## Of the consequences of Marriage, as it respects the Husbands right to the Wifes Estate.

The general principle by which the law as to this branch of the subject is regulated is founded on a Husbands duty to maintain & protect the wife. & her estate is so far only his, as to enable him to discharge this leading duty. The duty is the same tho he receive no property with her. His right to her property differs according to the nature of the property.

1<sup>st</sup> As to his Wifes personal chattels in possession?  
This in general becomes absolutely vested in a husband



## Husband & Wife.

by marriage. (Paraphernalia 1<sup>st</sup> kind, post.) He may dispose of it at pleasure - may bequeath it. If he dies intestate, before the wife, it goes to his Exec<sup>r</sup> or Adm<sup>r</sup>. 2 Bl. 435. 1 Bac 289. Co L. 351. 1 Com. 555.

He has no right to any personal property which his wife has in right and it. Adams & Com 556.

He is entitled to the personal chattels of the wife acquired by her during coverture. If therefore a debt is given the wife during coverture, & the wife is Adm<sup>r</sup> or without authority from the husband, should pay the same to the wife, & she should squander it away, the husband could compel the Adm<sup>r</sup> to repay it to him. 1 Com 555. 1 Bac 290. Salk. 115.

He is entitled to the avails of her labor. 1 Bac 290. 292. Esp. 127. Salk. 114.

### 11<sup>th</sup> of Wifes personal property in action or choses in action!

Of this property the Husband may dispose at pleasure, during their joint lives, as for a tailor, &c. Co L. 351. 1 Bac 289. 1 Com 550. Et. 110. Stra 516. 3 Mod. 50.

But reducing it into possession or some act of ownership is necessary during their joint lives to give the Husband title: otherwise it survives to her on his death. Fre. Chy. 209.

And it is laid down by Sacc that unless reduced to poss<sup>n</sup> during their joint lives her share in action would go to her representatives or her next of kin for the life. 2 Com. 5. infra. 1 Mod. 815. 1 Mod 342. 1 Mod 332. 2 Mod 150. 2 Mod 423. 1 Bac 289. 1 Com 25. Ch. 21.

## Husband & Wife.

The loss all right in this case as *Hust?* 2 Bl. 434.5.  
But by Stat. 31. Edw III & 29 Car II he may take it as  
Adm<sup>r</sup>. 2 Bl. 435. Chit. pl. 21.

By Stat. 31. Edw. in case of intestacy, in general, ad-  
min<sup>r</sup> is given to the next friend, who in case of  
the wife dying, was construed to be *p. hus?* 1 Roll 910.

By Stat. 29 Car. II. the *Hus?* as adm<sup>r</sup> is not liable  
to account to her Rep<sup>r</sup> which in fact gives the pro-  
perty to the *Hus?* 2 Bl. 515. 1 Bac 289.

In Con. we have no such Stat. In such case  
here adm<sup>r</sup> is granted goes to the next of kin in *p. first*  
instance. Stat. C. 165. There is no special provision  
for the intestacy of a wife here, nor is there any  
at C. S. It formerly belonged to the ordinary to ad-  
minister. Therefore here the *Hus?* is supposed to have  
no such right. If he has, our Stat. does not excuse  
him from accounting. But I think (opposed to Ba-  
con) that the principles of C. S. excuse him. Our  
Stat. compels distribution without any except-  
ion in his favor. 2 Bl. 515.

Though the *Hus?* is allowed by law to dispose  
of the wife's choses in action during coverture, yet  
he cannot devise or bequeath them; for a contract  
of devise is not completed till after the death of  
the *Hus?* & instantly on his death the choses sur-  
vive to her, & her right is considered superior  
to that of the Executors. Co L. 351. 1 Bac 28. D.

Though the *Hus?* as Adm<sup>r</sup> in England is not



## Husband and Wife.

Religious to account to the wife's Rep<sup>s</sup> for her ches in action, yet he is liable to pay her debts during co-verture whether contracted before or after marriage, yet if contracted before marriage, after her decease, if her husd. is alive, neither his or her Rep<sup>s</sup> are bound to pay them, but if she survives her husd.<sup>r</sup> the debt survives v. her & her Rep<sup>s</sup> Co. L. 381.

And even if another, on the husband's death is appointed adm<sup>r</sup>, the husd.<sup>r</sup> is entitled to his personal property in t<sup>no</sup>. after payment of her debts as being considered next of kin. 3. 4th 52b. 1101d 168 18. 45. 381.

And this right is transmissible to his Rep<sup>s</sup> so that if he dies, before taking adm<sup>r</sup> his Rep<sup>s</sup> will take it (which contradicts Bacon's rule, Sidm<sup>r</sup>).

It has been said, that a settlement by h<sup>r</sup> husd.<sup>r</sup> on the wife is an absolute purchase of her ches in action, so that they belong to him even before reduced to poss<sup>n</sup> as much as her property in poss<sup>n</sup> & that he not only has them if he survives, but if he dies first they go to his Rep<sup>s</sup> Pre Ch. 63. 312. 412. 3. 2. 46. 199. 2 over 501.

But it has been determined (by Chancery decis<sup>ns</sup> only) that this rule does not hold, unless there is an exp<sup>ss</sup> or implied agreement to that effect. 2 turn. 64. 4. 40. Pre Ch. 209. 11 m. 692.

If the settlement is made after mar<sup>g</sup>e it must be adequate. Scous. it is not a purchase at least not if 2d. 11. 10. 7. C. 285. n. 2. 11. 498.

## Husband and Wife.

If obligors of the wife be said, the husb. & wife are joint tenants of the fund. 10 Allen. 179. 3 St. 189. 1 Bac 273. 10 Conn. 346. 1 Conn. 555. 7. 276. Sid. 337.

If either dies then before collection or execution of such judgment in Eng. the accrescence would take place. but not in Conn. for it has not been adopted here. It is however an unsettled Que. in whom the fund w<sup>d</sup> here vest. Judge Reeve is of opinion that the whole would go to the wife whether she died first or not. He gives the reason, because the interest of the husb. grew out of the relation, & he holds in the right of his wife; & therefore his interest ceases when the relation ceases. But it is unsettled whether it shall go to the wife & her rep<sup>s</sup>, or one moiety to the rep<sup>s</sup> of the husb. if he die first. or in other words, to him as other joint income.

But even in Conn. the right of collection is in the husb. subject to accounting, if he survives, as in common cases of partnership rights.

A husb. may assign his wife's choses in action for a valuable consideration - not without one. 3 T. B. 94. 2 Atk 208. 420. 1 Forb. 308. 3 P. W. 199. Rob. 7. C. 295. 1 Bro. C. L. 44.

But a voluntary assignment, the void as to assignee has been held to change the property, by vesting it in the husb. But this is not law. Rob. L. C. 295. 1 P. W. 380. 2 Atk 208. 1 Bro. Chy. 44.

The husb. may not assign without, yet he may release his wife's choses in action without any consideration.



## Husband and Wife.

A husband has a legal right to be exonerated from the debt, but the wife has only an equitable property in the thing assigned. To recover in his own name there, he must sue in equity. But equity will not suffer the wife's right to be defeated, when it is greater than that of the assignee. 2 Atk 218. 1 Vent 308.

10. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

Even if the husband assigns them for value, the wife is liable in equity to the same obligation as the husband, to make provision for the wife. 2 Atk 218. 1 Vent 308. 1 P. W. 382. 251. 458. 3 Cro. Jac. 506. 15. 4 P. W. 226.

The wife whose husband cannot be taken to pay the husband's debt after his death but she survives to her without this incumbrance. 1 Burr. 289.

Neither can they be taken on account for his debts during their joint lives.

It is held that the goods of a joint sale in possession of another be bailed out or finding will absolutely in the husband by marriage, & he may sue alone for them. 1 Burr. 289. 2 D. 172. Moor 25. Vent 251.

The rule is otherwise, if there is a conversion or other injury to the goods by the bailee before marriage. 2 Atk. 631. I think the rule is founded on principle, for in the first case the wife at the time of marriage had a right to possess the goods; & a right to possess is construed by law a possession. They then come under the class of choses in possession. In the latter case a conversion had removed them from her possession & the husband & wife must bring an action jointly to recover as for other choses in action.

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It is held that in the first case, where the wife's goods are converted after marriage, the husb. cannot sue alone in an action of trover. 1 Sid. 172. 3 Bulst. 631.

But that he may sue alone in case of dolours. (1 Sid. 172.) Because they say in the first instance, they are goods in action & not in constructive possession, & the person converting them of course denies, that they ever were in poss<sup>n</sup> of the wife (I think this rule can not be considered law. But if goods are tortiously taken & converted before marriage, it is clear that they must join in the action to recover, for in this case the goods are in action & not in poss<sup>n</sup> for the wrong done holds by a right adverse to that of wife.

Voluntary Conveyances by the wife before marriage are sometimes adjudged fraudulent, as v. the husb. - e.g. a woman on the point of marrying makes a voluntary conveyance to a mere stranger. 2 Bro. 264.

Not so if the conveyance was made to provide for her children by a former marriage. 1 Fonb. 259. 1 Vern 408. 2 P.W. 358. 1 Atk 265. Coup 705. 1 Bac. 292. Coup. 280. Rob. F.C. 351. But 358. 9. also vid. Tit. "Fraud & Convey. cas"

Choses in action are notes, bonds, damages, & debts. (Judge Noyes.)

### III<sup>d</sup> Of Wives Chattels Real.

This is such personal property as savours of the realty, such as leases for years in this country, &c. These are limited in duration. real property is perpetual. Both are however immovable. 2 Bl. 386.

Over the wife's chattels real, the husband has a



## Husband and Wife.

more extensive right than over her choses in action.

Their chattels are both liable during their joint lives for the payment of his debts, & may be taken in execution by his creditors. not so as to charge them. 11 Can. 554. Co S. 46. 2 Bl. 1100. 344. 4 Cr. 639. q.

The husband's power exists only in his wife's right & the interest continues in her unless he disposes of it - i.e. if she survives him. If he survives the whole interest accrues to him. 1 Pol. 342. 5. Co S. 351. 45. 6. 300. 2 Bl. 438. 5. An. 11. 893. 3 P. W. 197. 1 Can. 554.

The husband has a right to dispose of them absolutely during their joint lives, but on the death of either in Eng. they go to the survivor, & in some jurisdictions in case of a joint purchase either to the wife & her heirs or like all other joint estates to the heirs of both. See Ch. 418. 2 Bl. 434. Co S. 46. 6. Ex parte v. Child. L. C. Aug. 1804. 5 T. R. 37.

In Eng. neither can devise the wife's chattels real. for the right of the survivor is considered superior to that of the legatee. But he did or any act executed during their joint lives, the husband may dispose of them & vest the power after his death. See Ch. 418. 2 Can. 270. 2 Bl. 434. Co S. 351. 176. 1 Bl. 538. 1 Can. 554.

There is a right of future enjoyment passes instantaneously. Co S. 287. 1 Pol. 344.

Not so by a Devise. for this vests no right till the devisors death.

No property can be taken to pay the debts of a deceased person that w<sup>d</sup> not go to his legal heirs.

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therefore the chattels real of the wife cannot be taken to pay the debts of the husb. after his death nor in Eng. to pay the wifes debts, if she dies first, as the *ius accrescendi* prevents. 1 Mol. 349. 1 Com. 556.

If a feme sole who is a joint tenant of a chattel real marries & dies, the whole goes to the other tenant by survivorship, & not to her husb. for if Co. tenant had a contingent right to that estate previous to marriage. But if the Co. tenant sh. die first then she & her husb. w. be joint tenants of the whole.

The husb. may assign chattels real, even in Eng. without a consideration. 1 Rob. F. C. 299. 301. 12 Ver. 18. 1 Ch. Ca. 306. 3 P. W. 39. 2 Vern. 270.

### IV of the Wife's Real Estate of inheritance.

Of the real estate of the wife the husb. has the sole usufruct or enjoyment during coverture. But he cannot at C. E. alien alone, it not being necessary to give effect to the governing principle. 1 Bac. 286. 300. 1 Sid. 11. 1 Mol. 347. 2 Inst. 515. 10 Co. 42.

Nor can the husb. & wife by their joint act alien her inheritance, except by judicial proceedings as fine & recovery. 1 Bac. 301. 2 Inst. 515. 1 Mol. 449. Litt. 869. 70.

But in law she can convey her real estate by joining the husb. in any other mode of conveyance. Stat. C. 265.

By Stat. 32 Hen. 8. the husb. & wife are enabled to make leases of her fee simple, or fee tail, for 3 lives or 21 years. 1 Bac. 309. 10. Cro. J. 22. 378. 5 Co. 9.



## Husband and Wife.

If the hus.<sup>d</sup> grants a larger estate than for his life, in his wife's lands, there is no forfeiture - as there is in other cases of particular tenants. It will enure only as a grant for his life at most - poss. title for life as the wife may die & he not be entitled to curtesy. 1 H. 4. 15. 2 Bl. 278. 279. 9 Co. 140. 1 Bac. 301. 2 L. d. 681. Co. L. 326.

On the death of the hus.<sup>d</sup> the wife's real estate reverts solely in the wife. on her death the fee vests in her heirs whether the hus.<sup>d</sup> survives or not. But the hus.<sup>d</sup> in case of a child born alive, capable of inheriting has an estate for life in the whole of what the wife died seized, by the curtesy of England. 2 Bl. 126. Litt. 3. 30. 32. 1 Bac. 659. Co. L. 30.

In Gavel-kind tenures, the hus.<sup>d</sup> may be tenant in curtesy without having issue. 2 Bl. 128. Co. L. 30.

Our tenure of lands by charter of Car II. was according to gavel-kind. But this kind of curtesy was never adopted here.

Since the reversion was declared allodial (Stat. 253) he is not entitled to curtesy in a reversion or reversion. 2 Bl. 127.

The seisin of the wife must be actual seisin during possession, except in case of some incorporeal hereditaments - for from the nature of these she can't have actual poss.<sup>n</sup> 2 Bl. 127. Co. L. 29. 2 Bl. 130.

The marriage must be legal to entitle the hus.<sup>d</sup> to curtesy, & the issue must be born during the life of the mother. If then the issue be taken from

## Husband and Wife.

the wife by the Caesarian operation, the estate shall go absolutely to the infant, for it vests in him in utero. So mere & could not remain in abeyance. 8 Co. 35.

1 Bac 689. 686. Plow 283. Co L. 30. 29. 2 Bl. 127.

The husband is tenant by the curtesy initiated from the birth of the child, but his title is consummated by the wife's death. 2 Bl. 28. Co L. 30.

About 28 or 30 years ago, it was decided in Conn. that the husb. might be tenant by curtesy only during the minority of the issue. But in case the issue died before, no collateral relations of the wife could curtail the estate. But usage & later decisions have confirmed the C. L. that the husb. may hold by curtesy during life.

At C. L. arrears of rent due to the wife while sole w. not survive to the husb. but go to her rep. on her death, unless he had previously reduced them to possession. 4 Co. 51. Co L. 162. a. b. 351. a. 2 Bl. 435.

But by Stat. 32. Hen. 8. such arrears are given to the husb. & vest in him on his wife's death, & tho he die before he has reduced them to poss. they go to his Exec. &c. 2 Bac. 17. Co L. 351. a.

Rent accruing out of the wife's property during coverture, at C. L. goes to the survivor absolutely, unless reduced to poss. during coverture. Co L. 351. a. 1 Com. 557. 576. Ambl. 692. 1 Roll 350. 2 Bac. 17. 4 Co. 51. Co L. 162. b.

At C. L. the wife can have no property separate from the husb. 1 Pow. C. 103.



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But now a gift to her sole & separate use, is protected in Chy. & to property thus vested in the wife the husb. has no right by curtesy or otherwise.

Over such property she may exercise as absolute power as if a feme sole, except that she cannot devise it if real. by Stat. Hen. 8. 1 Hen. 444. 1 Hen. 66. 87. 90. 1. 8. 102. 3. 3 Atk 392. 1 H. 270. 3 O. W. 337. 3 Atk 695. 1 Ves 303. 6 Bro C. 2. 156. 2 Vern 748. 2 Ves. 191. 663.

It is settled in Com. that the wife may devise her real estate by C. L. whether to her sole & separate use or not, but cannot thereby defeat the husb. of any right, as tenancy by curtesy.

The husb. cannot by his dissent defeat a gift to the sole & separate use of the wife. tho he may defeat her common purchasers. Co L. 3. a. 356. 1 Buc. 303. 1 Com. 554.

Since by the relaxation of the C. L. the wife has been allowed to hold separate property, it has been thought necessary that trustees sh. stand sided to her use. But now it is settled that property real or personal may be given to her directly before marriage or after by the husb. or any other person. 1 Font. 98. 1 O. W. 126. 2 O. W. 79. 316. 1 Atk 270. 5 T. R. 434. 30 T. R. 618. 2 Ves. 665. 1 Pow. C. = 444. 1 Font. 94. 5.

Tho' it has been held that if a feme sole possessed of a trust for a term to her separate use, married, her interest in it vests in the husb. jura marita. 1 Font. 98. 1 Vern 7. 18. 2 H. 270. 2 Atk 421. 2 Bro C. 345. contra Co L. 3. a. n. 1. 112. 4 Co. 29.

## Husband and Wife.

### Of the right of the Wife to the Husband's Estate.

In Eng. & Conn. (under the Stat. of distributions, 22 Car. II. Stat. C. 165. b.) if the husb. die intestate, after his debts are paid, one third of his personal property vests absolutely in the wife if he left issue, & one half, if he left no issue. 2 Bl. 518. 2 Bac. 427. 8.

Also at C. & D. for a dower the wife is entitled to a life estate in one third of all the husband's inheritable estates, of which the husband was seized at any time during coverture, & which any issue, whom she might have had, could have inherited. Litt. § 56. 53. 1 Bl. 129. 131.

The husband cannot by alienation bar her of this right. To bar herself in Eng. she must join in a judicial conveyance. In N. York in the deed. &c. in Mass. 2 Bac. 139. 140. 2 Inst. 349. 10 Co. 49. Plow. 515. 1 Inst. 32.

But the wife cannot have a dower of any of the husband's property which any issue she might have had, could not inherit. As e.g. if he was a tenant in special tail. Litt. § 53. 2 Bl. 131.

To entitle the wife to a dower, she must have been the actual wife, at the time of his death. At C. & D. divorce a vinculo takes away the right. Divorce a mensa it does not, for she still continues to be his wife. 2 Bac. 130. 7 Co. 70. 5 Co. 48. 1 Pol. 681. Co. L. 32. 33. C. Moy 108. Bro. C. 463. 9 Co. 19. 3 Com. 127.

If the husband dies before the age of consent, the wife is still to be endowed. But she must be above



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the age of 7 at her husband's death, & have <sup>been</sup> married de facto. Such a marriage is voidable because at the age of consent either may avoid it, but they may also make it valid & need not marry over again.

3 Com. 128. Co L. 33. 31. 40. 2 Bl. 131. Litt. 8. 36. 3 Com. 128.

The wife has her dower, tho above 100 years old at the time of marriage. 3 Com. 128. Co L. 40. 1 Rot. 675.

A wife is not barred of her dower because she is physically unable to have issue. *Idem*.

It was formerly held that the wife of an idiot might be endowed, tho the hus<sup>d</sup> of an idiot could not be tenant by curtesy. But the rule could not be founded on principle & is now exploded.

Co L. 31. 2 Bl. 130. 3 Com. 127.

The wife's right of dower is paramount to the claims of devisees, creditors or even mortgagees when made during coverture; if prior to marriage it was such a specific lien on the land that the marriage will not defeat it. Yet tho the debt for which the mortgage was given existed antecedent to marriage, still the wife's right shall be preferred. Her right to personal property is not so great. In Con. as in Eng. 1 Root 127. Dougl. p. 102. 2 Bl. 492. Co L. 31. 35. 2 Bac. 144. 4 Co. 64. 66. 10 Co. 48.

Her title has relation to the marriage & to her husband & devise. Devise in law is sufficient to entitle the wife to dower. The reason seems to be that it is not in her power to remove the devise in law.

## Husbands and Wife.

to actual possession during coverture, & she might be defeated were seisin in fact necessary. 2 Bl. 131, 132. 3 Com. 128. Cro. J. 503. 1 Inst. 31.

But seisin in law is not sufficient to entitle the husband to curtesy, for it is in his power to have actual seisin.

In Con. the wife is entitled to a life estate in one third of the inheritable property of which the husband died seised; & in that only. Our Stat. says, "of what he died seised." But here seised & ownership are often synonymous. Therefore actual seisin or possession is not necessary under the Stat. Post 50. Stat. C. 146.

In Eng. she is entitled to one third of what he owned at his death, except where free bench is not allowed. Coup 48.

Husband may defeat her right, in Con. by alienation, not however if made in contemplation of death, & as a provision for his family, for this is considered but a testamentary disposition which does not bar her right. She is here endowed, even tho she hus. was dispossessed.

In Eng. the wife is not entitled to a dower in an equity of redemption of a mortgage in fee. She is for a mortgage for a term. In Con. for both. Pow. M. 321. 2 Atk 526. contra 2 P. W. 700. Pow. M. 319.



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## How a Wife may be barred of her Dower.

Right of dower is barred by the wife's elopement with an adulterer: also by a Divorce a vinculo. 2 Inst 435. Co L. 37. 2 Inst. 142. Roll. 680. 3 F. W. 276. 2 Bl. C. 130. 137.

So too by alienage: i.e. by being born an alien, except in case of the Queen Consort. But in this case the right is rather prevented than barred, as aliens cannot hold land. 2 Bl. C. 131. 136. 1 Inst. 31. 34.

In Eng. the Treason of the Husband bars the wife's right of dower. In Con. we have no such law; the husband here does not forfeit his estate for treason. 2 Bac. 143. 9 Co. 17. 13. 5 Co. 75. 2 Bl. C. 130. 1.

In Eng. so long as the wife withholds the title deeds from the heir, her right of dower is barred. I think it w<sup>d</sup> be otherwise in Con. as our deeds are kept on record & need not be produced as evidence of title as in England.

By Stat. of Gloucester, 6 Edw. 1. an attempt to alienate a greater estate than she owned in the premises was a forfeiture of the wife's dower; I think on C. L. principles that a tenant shall forfeit his right for so doing. 2 Bl. 275. 130. 1. 6 Co. L. 251. a 25. 3 Bac. 230. Co L. 32. 37.

By accepting a jointure before marriage, the wife bars her right of dower. This must be expressed to be in lieu of a dower: must take effect on the death of the husband, & must be of freehold, <sup>at least</sup> during her life. But if the settlement is made during cohabitation, or by will, she may accept it or not, in lieu of

## Husband and Wife.

of her dower, or she may take it & claim her dower.

2 Bl. 137. 8. 2 Bac. 140. Dy. 358. 1 Bulstr. 173.

Can a jointure be of personal property in Con? Judge Reeve thin as it cannot. Stat. C. 237. Fairfild 67. 1810.

But an executory agreement by the wife before marriage to accept personal property or money in lieu of dower, may be enforced in equity. See C. 23. 1810. 55. Ed. 11. C. Co L. 36. b.

So in Eng. (ut ante) by levying a fine, or suffering recovery with her hus. of the land during coverture the wife loses her right of dower. 2 Bac. 137. 140. 10 Co. 49. &c.

In Con. a divorce a vinculo does not work a forfeiture of dower, if the wife is not the faulty party, but the Ct. on application will order her a sufficient maintenance during the life of the hus. out of his estate. It is doubtful how it would be in case of a divorce for a fraudulent contract. (See postea.) See Title "Divorce". Stat. C. 147.

Paraphernalia & property given to her sole & separate use are sometimes distinguished with difficulty. As to property holden to her sole & separate use, the husband is supposed to be a stranger. She holds to the utter exclusion of any right in him. Not so as to her paraphernalia, except of the 2<sup>d</sup> dep. (hereafter.)

Property to vest exclusively in a feme covert must be given to her sole & separate use. But no form of words is necessary. It is suff. if the intention is apparent. 1 Albiq.



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In some cases the intention is to be inferred not from any words or intensions of it, but from the nature of the property & the circumstances under which it was given. e.g. Diamond, plate &c. given by the husband's father to his wife on her marriage day, or a similar present to a stranger. Trinkets given by the husband himself in his life time are also in some cases exclusive to the wife, separate property & not liable for his debts. It depends as I said, on the intent. 10 Vent. 28. 2 Atk. 59.

Property devised by the husband is not considered as to her sole & separate use so as to bar creditors, but is on her marriage with a second husband. She takes as devisee which presupposes that the property was the husband's.

Property given by husband to the wife in his lifetime for the express purpose of being worn as ornaments of her person, is not her separate property as against creditors, in the above sense, but liable under a certain qualification for his debts, & it remains as to a subsequent husband. They are Paraphernalia.

### Of Paraphernalia.

This in its Greek etymology means something over & above dowry. It is of two kinds.

1. Necessary apparel & bedding.
2. Ornaments, as jewels & Trinkets in general.

1 vol. 211. 1 Com. 558. Moore 213. 216. 2 Bl. 440. 435. 6.

## Husband and Wife.

The first kind cannot be taken by creditors, nor can the husband sell them or certainly not all of them, but her apparel, unnecessary for her comfort & decency he may dispose of. What is necessary can't not be taken by his creditors after his death. 3 Bac. 498. Park. 3. 300. 2 Bl. 436.

During his life the paraphernalia of the 2<sup>d</sup> kind are at the husband's disposal, but according to Mod. law authorities he cannot devise them. 1 Com. 558. 209. Bro. 250. 343. Roll. 911 overruled 2 Atk 77. 217. 404. 578. 3 Atk. 358. 395. 2 Bl. 436. 1 Roll. 911. 1 P. W. 730.

They are assets in the hands of the husband's executors & admors to pay his debts after the other personal property is exhausted & not before. 1 Com. 550. 2 Atk 104. 3 H. 369. 10. W. 730.

As to these the wife is preferred not only to his wife but even to legatus. 3 Atk 395. 1 P. W. 730.

Land in Eng. is liable in the hands of the husband for specialty debts. If then specialty creditors take paraphernalia of the 2<sup>d</sup> kind, in that the wife is as a creditor w. the husband for so much as these creditors have taken of her paraphernalia. 2 Atk 109. 10. W. 730. 3 Atk 369. 2 H. 77.

If there is no trust on the real estate for payment (of debts, & her paraphernalia are taken by creditors, the widow cannot at all events come upon the real assets; i.e. probably she cannot in all cases as if simple contract creditors take of par<sup>na</sup>. 2 Atk 104. 5.



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But if the husband creates a trust estate in lands for the payment of debts, these by simple contract may take it; personal property however is first liable.

If then paraphernalia of the 2<sup>d</sup> class are taken for even simple contract debts, the wife in equity will be considered as a creditor v. the heir. 3 Atk 438. 2 H. 105. 1 Com 558.

She has also the same right v. the devisee of lands, as v. the heir - for her claim is preferred to that of legatus or devisee. 3 Atk 395. 1 P. W. 230.

Jewels, which the husband kept in his own possession, but permitted the wife to wear as ornaments are paraphernalia of the 2<sup>d</sup> class. 2 Atk 77. 1 Com 558.

A settlement or jointure on the wife before marriage is bar of all demands on the husband's estate, or in pursuance of articles made before marriage, stipulating that the settlement should be in bar takes away her right of paraphernalia. 2 Vern. 49. 83. 1 Com 559. 2 Atk. 642.

If the hus<sup>d</sup>. pledges the wife paraphernalia the wife or not the Exec<sup>r</sup> after his decease has the right of redemption. And if there is a surplus of personal property after payment of debts, the wife is entitled to it, to redeem with, even in exclusion of legatees. 1 Com 559. 3 Atk 395.

So if in the case supposed the personal fund has been exhausted by specially creditors she has the same right, I suppose, v. the heir. So I suppose if,

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if the husband's lands were charged with the debts and the personal fund has been exhausted even by simple contract creditors. for in both cases she ought, after payment of debts, to stand in the place of the respective creditors.

The wife's right to property as paraph<sup>a</sup> is personal & not transmissible. e.g. If the husband devises paraph<sup>a</sup> of the 2<sup>d</sup> kind to the wife for life, remainder to another. The wife holds during life as under the will, not claiming them as paraph<sup>a</sup>. On her death they go to the rem<sup>or</sup> man, not to her Exec<sup>r</sup>. or adm<sup>r</sup>. For as she made no claim to them as paraph<sup>a</sup> her adm<sup>r</sup>. cannot. But suppose she had done nothing amounting to a waiver, or even claims as paraph<sup>a</sup> after her husband's death, I think her right is then transmissible, to her rep<sup>s</sup>. 2 Vern. 246. 1 Con. 559.

In Conn. real, as well as personal property is liable for all debts. If the Exec<sup>r</sup>. sh<sup>d</sup>. take & paraph<sup>a</sup> for payment of debts, when other personal assets were sufficient, he would be immediately liable to reimburse the widow. It is a Qu. whether he can take them at all in such cases, unless both personal & real funds are exhausted. If he can the widow will be a creditor to the amount of them, as all the estate of the deceased, real & personal.

By Stat. of Conn. 1714. when if & hus<sup>d</sup>'s estate is insolvent, necessary household goods are allotted to & wife, by the Judge of Probate.



# Husband and Wife.

## Of the Husband's liability on y. wife's account.

Husband & wife are jointly liable,

I. For the wife's debts

II. For her torts,

III. For her crimes, in some cases.

I. They are jointly liable, during coverture, for her debts contracted while sole. But his liability ceases on her death, unless paid before, & it seems unless judg<sup>t</sup> is recovered. 1 Rot. 351. Cro. E. 366. 376. Ey. C. ab. 60. 1 Bac 307. 7 T. R. 348. 1 Bl. 443. Esp. 122. 1 Bac. 293. 1 S. & 337. 3 Mod. 186. Carth. 30

So if the Hus<sup>d</sup> dies first & before payment, she & not his Exec<sup>r</sup> is liable. Suppose judg<sup>t</sup> first had ss. them in this case, it alters the debt & makes him liable.

If then she dies first (no judg<sup>t</sup> having been recov<sup>d</sup> at Supra) the creditor loses his debt, unless she leaves assets. Esp. 122. 3 P. W. 407. Co. L. 351.

The principles on which the husband is liable are that as the wife by marriage loses command of her property, & is thus deprived of the means of securing herself from arrest & confinement, she ought not to be personally liable without the Husband. Besides he has the avails of her labour. 1 Bac. 292. 1 T. R. 486. F. N. B. 265. Moor 468. 3 Mod. 156. 1 Rot. 352.

She cannot, therefore, in any manner proceed in any civil action be taken & holden alone for debt or tort. She must in this case be discharged on common bail, which is merely a nominal affixion to keep the suit alive. 1 T. R. 486. Cro. J. 445. 2 Bl. R. 728. Sack 115. 1 Bac. 307. 8. 1 Wils. 149. 3 H. 124. 2 Ray 73. 6 Mod. 17.

## Husband and Wife.

If however an action is brought *v.* her while sole, pending which she marries, she need not be discharged for judgment. Execution & collection must proceed *v.* the same person & the same name that the misne process was. She is therefore to be taken alone on the Ex. ion. 6 Geo. 2. 323. Esp. 328. 4 Bac. 40. 3 Bl. 414. Cro. C. 510.

As the Hus. when taken alone on misne process is discharged; so if both are taken on misne process she is discharged & he remains in custody till he puts in special bail for both. for no other person it is supposed will become bail for his wife, who has no property at command. 5 Com. 194. 2 Bl. R. 720. Stra 147 v. contra. 1 Vent 49. 1 Lw. 51. 2 Bl. 327.

She will not however be discharged in a summary way, tho arrested alone, as feme sole, unless coverture is notorious. Still less if she has imposed on the plff. by pretending to be a feme sole. The Def. in such cases must plead coverture. 2 Bl. R. 403. 720.

Now is she discharged in a summary way, if her hus. is an alien. 2 M. R. 380. Salk. 646. 1 M. R. 81. 2 B. 203.

On final process a person is not allowed bail. If therefore the wife is taken alone on final process *v.* both, she is not to be discharged unless there is a collusion between plff. & hus. to keep her in prison. Stra 1157. 1237. 2 Bl. R. 720. 3 Wils. 124. 149. Esp. 327.

II. The Hus. is liable jointly with the wife, during coverture for her torts committed while sole. The Law is the same, if she alone & without *j.* direction, appro-  
ba.



## Husband and Wife.

bation, or consent of the hus.<sup>d</sup> commit a tort during cohabitation. Cro. C. 301. 10 B. & C. 290. 307. 3 B. & C. 414. Stra. 1257. 11 Wils. 149. 12 B. & C. 251. 6 B. & C. 376.

But if the Tort was committed by his command, or by her in his company, during cohabitation he alone is liable. But would he be, if the presumption of his coercion could be rebutted? 1 Com. 575. Cro. C. 355. 184. a 254. 481. 1 B. & C. 348.

Where the hus.<sup>d</sup> & wife are jointly liable for her torts, she continues so after his death. Palm. 310. Cro. C. 365. 519.

But the hus.<sup>d</sup> is liable for his wife's torts, during cohabitation only, i.e. I suppose where they are jointly liable during cohabitation. Cro. C. 374.

So if she commit the Tort in his absence, but by his direction, he alone is liable; for she is supposed to act in this case by coercion & is bound to obey. 1 Hawk. 3. 4. 1 B. & C. 28.

III.<sup>d</sup> Husband alone is in some cases, liable for the crimes of the wife. e.g. the cases of Trespass or larceny committed by her, thro his coercion or in his presence he is liable alone. There the act is considered as his. The same exception extends to burglary committed by her in his presence, & according to some opinions it extends to robbery under his coercion. Query.

1 Hawk. 4. 1 B. & C. 31. 4 B. & C. 28. - (1 Hale 2. 6. 5. 1 Hawk. 4 to the rule).

The wife is liable, as if sole, if she commit theft &c. voluntarily, or in her hus.<sup>d</sup> absence at his bare command. Such command, it seems, falls short of coercion.

1 Hawk. 4. 1 B. & C. 31. 4 B. & C. 29.

For higher crimes, as treason &c. committed by both,

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both are liable, tho the hus<sup>d</sup> used coercion. And if by her alone, she alone is liable. Hale. C.C. 65. 1 Hawk. 120. 4 Bl. 24.

If the wife incurs the penalty of a penal Stat. the hus<sup>d</sup> is bound to pay it, tho she commit the act alone & without his privity. He is liable with her, & may be made a party to an action or information. 1 Hawk. 5. 2 Bac. 234.

If in his company, & with his approbation, he is liable alone. I suppose. 1 Hawk. 3. 4. 5. & auth<sup>s</sup> there cited.

The wife is not accessory in felony, for receiving her hus<sup>d</sup> & assisting him tho a felon. & she knows it, and she does it with an intent that he may elude public justice; nor in case of treason does she become principal, but is excus<sup>d</sup>. 1 Hawk. 4. 3 Inst. 106. 1 Hale. 44. 4 Bl. 38. 2 Hawk. 451.

The wife is excus<sup>d</sup> from the commission of small offences, & not for higher, because in higher crimes the command of the Law is tantamount to that of the husband.

In all cases to which the above exceptions do not extend, the wife is liable as if sole. 1 Hawk. 4. 9 Co. 72. Mol. 93. 3 Kil. 34. Cro. J. 482.

### Of the Wifes power to bind the Husband.

Her power to bind the hus<sup>d</sup> during coverture, by her contracts, is said to be founded on his assent, express or implied. 1 Bac. 297. Salk. 118. 6 Mod. 239. Mol. 351. 1 Com. 557. 1 Bl. 430. 4 Leon. 42. 1 Siler. N.B. 287. 296.

This principle is however too narrow in many cases. (17 Bl. 348. &c.) For the hus<sup>d</sup> is often bound when he expressly refuses to be bound. e.g. he must provide her with necessaries - & if he refuses she can bind him. Tho for



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any thing beside necessaries she cannot as wife bind him  
by her own contract. 1 M. 442. 1 R. 120. 1 Com. 507. 1 S. p. 122. 1 Mod. 351.  
J. 7. Salk 118.

The true principle then, in which he is bound by  
her contract for necessaries, seems to be, his obligation  
as husband to provide her with necessaries i.e. medicines,  
& food & apparel, suitable to her rank. 1 S. p. 122. 4. 2 S. 4. 1 R. 120. 132.

It may be said that from his duty the law implies  
his assent, & that the implication is not rebuttable. At  
any rate, where the husb. is bound without actual assent  
it is on the ground of implied assent or duty as husband.  
Salk 118. 1 Mod. 237.

The husb. tho' an infant is bound for his wife's ne-  
cessaries - for as the law allows him to contract in mar-  
riage, it lays him under all the duties of a husband.  
Stra. 168. 1 Kenble. 67.

Off. having power to discharge himself by dissent  
where he would otherwise be bound, he does not. He may  
be consid<sup>d</sup>. as bound by his implied assent. So if not hav-  
ing power to discharge himself, he does not attempt it,  
he is bound by implied assent. But if not having this  
power he attempts to discharge himself i.e. prohibits the  
contract, the husband seems to be bound on the score of  
marital duty. 2 S. Ray. 1008. Salk 118.

That husb. cannot be bound except by his consent  
express or implied vid 2 Warr. 297. 1 S. p. 287 p.

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Cases in which the wife may bind her hus.  
clearly on the ground of consent.

1. Where the hus. gives his express consent before the contract. 1 B.C. 429. 4 Inst. 409.

2. Where the hus. consent is expressly given after the contract. 1 Com. 567. 1 Hol. 350. 1 Sid. 120.

3. Where the wife usually provides necessaries for the family & the hus. pays for them. There is an implied assent for her to contract. 1 Com. 568. 1 Sid. 128. 1 B.C. 430.

4. Where necessaries are provided by the wife & come to the husband's use or the family. There is his implied assent subsequent. But he must be supposed to know they were used by the family. 1 Com. 567. 1 Sid. 120. 3 Inst. 333.

In these cases the wife acts as a servant. The contracts are contracts of the husband. So perhaps in some other cases, which will be mentioned, he is clearly bound on the principle of assent. 1 B.C. 430. 1 Sid. 120. 126. 109. 1 Hol. 351. 1 Sal. 118. 2 Vern. 155. Stra. 1214.

A general credit given to the wife (ut supra) cannot be determined by any private proposition, so as to defeat the claims of those, who afterwards trust her on the husband's account. So in the case of servants. The prohibition of credit must be as extensive as the credit she then has. 1 B.C. 430. 1 Show. 95. 2 Vern. 643.

If the wife, not having a general credit, purchases chattels & places them, without having worn them, the husband is not liable.



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because they never came to his use. Otherwise, if she had worn them & pawned them. *Salk. 118. 288. Ray. 1000. Esp. 123. 1 Bac. 300.*

If the wife pawn her clothes before or after wearing them & borrow money to redeem them her hus.<sup>d</sup> is not liable for the money. This transaction is distinct from that of procuring necessaries. *2 Show. 288. esp. 123. 1 W. 183. 1 Cal. 350.*

If the hus.<sup>d</sup> turns away his wife, he is liable at all events for her necessaries unless she commits adultery. So, *Sup. 1000.* if for her bad usage she elopes. *5 T. R. 606. 4 Bur. 2078. Salk. 119. 1 Com. 558. 115. 1 H. Bl. 348. 12 Mod. 244.*

No prohibition, general or special, will in this case avail him. His assent is implied according to *Salk.* i.e. he gives her a general credit. *Salk. 118. Stra. 1214. Esp. 124.*

If a man cohabits with a woman, & allows her to assume his name, he is liable for her necessities as for his wife's tho' not married. Therefore in an action for the debt of the wife, "never married" is a bad plea on general demurrer. Such a plea is good in an action for dower & on an appeal. *Root. 127. Lovel. p. 102. 2 Bl. 442. Co. L. 31. 35.*

But if hus.<sup>d</sup> & wife part by agreement and the hus.<sup>d</sup> allows her a separate maintenance, he is not bound for her necessities (i.e. ante) after the separation is generally known in the place in which he lives. Whether

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known or not to the person trusting or in the place where trust is given is immaterial. The presumption is *y.* the wife was trusted on her own credit. 1 L. Rayd. 444. 1006. Salk. 116. Esp. 126. 12 Mod. 244. 6 Pl. 147. 1 Bac. 300.

For things entrusted to her before the separation was thus generally known, *y.* hus. is liable.

If the wife, living separate, has no separate maintenance, the hus. is not discharged from her necessities. Esp. 126. 4 Burr. 2078. 6 T.R. 604.

If the wife elopes & lives with an adulterer, the hus. is clearly not liable after the elopement is notorious - & according to the current of authorities he is not liable at all, but "discharged for *cohabit.*" \* Salk. 118. 6 Mod. 171. Esp. 125. 1 Bl. 442.3. Str. 647. 1 Lev. 8. 10 B. & P. 338. 1 Tan. 700. 12 Mod. 244. 6 T.R. 603. L. Ray. 444. 176 Bl. 348.

By some decisions it makes no difference whether the elopement was adulterous or not. 2 Str. 875. Salk. 118. Esp. 125. 10 Pow. 6. 96. 1 Lev. 5.

When the elopement is not adulterous, I think the hus. should be liable for her necessities, till it is notorious. But he is not - nor is she liable, for she is still to all intents his wife. She has no property separated sole. His marital rights remain entire. 2 Bl. 10. 1079. 10 Pow. 96. 8 T.R. 547. Esp. 125. 10 Bac. 297. Str. 875. n. 4. T.R. 56.

A wife living in Adultery is bound by her own contracts. 1 B. & P. 338.

If the hus. leaves her at his own house, with his children, having made no provision for them, & she

\* The doctrine relative to the liability of a wife, in debt &c. on her own contracts, &c. &c. is now maintained as it seems to be in now overruled. *vide* Marshall v. Kutton 8 T. R. 455. 7 East 582. 3 Esp. 250. 2 Pl. 147.



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living in a state of adultery, he is liable for her necessaries, if the plaintiff did not know of the adultery. 10 B. & C. 226.  
Str. 477. 6 D. R. 603.

Where the husband & wife live separate, & the husband is liable for necessaries furnished her, the articles should not be charged generally as furnished to him - but the special matter should be shown. If not the cause of action would not be identified, so as to be a bar to subsequent actions. Quere. Str. 127.

If the husband provides necessaries for his wife at home, he has a right to prohibit the public as well as any individual from trusting her, & may thus discharge himself. 1 Lev. 5. 1 S. & 109. &c.

He may thus terminate any credit, which he has given her with the public or individuals. Salk 118. D. R. 444. 1006.

But he cannot thus deprive her of the right of procuring necessaries. Esp. 122. 10 B. C. 442. Salk 118. D. R. 1006.

If a wife elopes, not with an adulterer, & afterwards offers to return, & the husband refuses to admit her, he must support her & is bound for her necessaries afterwards. Esp. 125. 1 Cow 568. 10 B. C. 299. 300 Str. 875. Quere, Salk 119.

In this case a general prohibition by the husband against trusting the wife is not good; a special prohibition is good, or the wife might make him liable to his greatest enemy. 1 Lev. 4. 1 S. & 109. &c. 4 B. C. 2177. 10 B. C. 296. &c. 1 Mod. 124.

Suppose the elopement adulterous, he is not then bound. Where the wife is guilty of the first wrong. Str. 875. 6 D. R. 603.

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If the hus.<sup>d</sup> turns her away (or probably if she leaves his house by very ill treatment) he is bound for her necessities against a general, or even a special prohibition. Here the hus.<sup>d</sup> is guilty of the first wrong. 2 Steas. 1214. 12 Mod. 244. Salk 118.9.

For money lent to the wife, the hus.<sup>d</sup> is not liable unless actually expended in purchasing necessaries, & then he is liable only in Chancery. Because as there is danger of misapplication the law will not favor the lender. For the contract is good or bad at the time of lending & is not affected by matter or post facto. In Chancery the lender stands in the place of vendor & recovers the amount of the necessaries. Dunry. If the lender himself lay out the money in necessaries. Salk, 279. 387. 1 P.W. 483. Pro. Ch. 502.

It has been held that a private settlement by a woman before marriage of property to her separate use was fraudulent as v. her husband. 1 Fonbl. 259. 2 Wms. 17. 2 P.W. 535.

So that if a woman possessed of a trust term, i.e. an estate in lands in trust for her to her sole & separate use, marries, the interest will vest in the hus.<sup>d</sup> jure mariti. The reason seems to be, that the hus.<sup>d</sup> not knowing that it was to be to her sole & separate use, supposed he should be joint tenant with her. 1 Fonbl. 98. 1 Wms. 18. 2 H. 270. 2 Atk 421. contra 2 Bros Chy. 345.

A contract by which one is bound to the hus.<sup>d</sup> to pay money to the wife is not subject to her control.



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She may receive the money as it becomes due; but cannot discharge it. 3 East. 331.

If the husband & wife separate by deed, the husband stipulating an allowance for her maintenance; & the allowance is duly paid, he is liable on his contracts for necessaries. 2 New. 10. 148.

### Of the Wife's power to bind herself by her own contracts.

A general rule of C.S. that a wife cannot make herself liable by contracts, because merged in her hus.<sup>d</sup> & not for want of discretion. 10 Co. 42. Pol. 347. 1 Bl. 442.

Regularly at C.S. her contracts are void and not merely voidable. 2 Bl. 293. Pow. 90. 7. 20 Pl. 144. Salk. 7.

But a redelivery of her deed, after her hus.<sup>d</sup> death, or what is equivalent to it, will bind her. Cowp. 201. 4 Cruise 8. 20.

Her Deeds are only voidable, on motives of policy for the advancement of agriculture. Cowp. 203. Doug. 53. 10 Font. 131. 10 R. 478. Contra 3 Bac. 304.

She may convey lands in performance of a condition, when land is vested in her on condition of conveying to another. 4 Cruise 2. 20. 1. 2 Bl. 292. 3.

The true principle of the rule; that the wife may not bind herself by her contracts seems to be; - 1st. The Law has either deprived her of property, or disabled her to dispose of it; and the Law will not deprive off. means and then enforce performance. - and as the hus.<sup>d</sup> has a right to her property could she dispose of it his right w<sup>d</sup> be violated. 1 Bl. 359. 1 R. 336. Cook 13. 25. 1 Pow. 101.  
34, 5, 6.

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2<sup>d</sup> Coercion. *Quere.*

3<sup>d</sup> If liable for her own contracts, her person might be taken, which would violate the superior right of her husb. to her person.

But as Chancery has allowed her to hold separate property, she may now bind herself to the extent of such property, & no farther. This does not violate the husband's right, as he had no right to such property. 1 Donb 90. 1. 102. 1 Bro. P.C. 156.

But she is not bound in this case at Law; for if so, her person might be taken, which would destroy the governing principle, that the husband's right may not be violated. 2 Ves. 190. 2 Atk 379. 1 Bro. C. 16. 1 H. Bl. 334. 2 Pw. 144.

If there are Trustees of such property for the wife, she may dispose of it without their intervention, unless their joining is made necessary by the instrument, under which she holds. 1 Donb. 103. 1 Ves. 517. 1 H. Bl. 334.

If the husband is banished, or has abjured the realm or is transported, or is an alien enemy, he is civiliter mortuus, & the wife is considered as feme sole. She may contract at C. L. is liable to be sued, arrested &c. and may sue alone. Coml. 402. Salk. 116. 646. 2 Esp. Ch. 554. 587. 15 W. 75. 6. Moore 851. 2 Esp. 127. Jenk 4. 1 K. L. 50. 400. 1 Sac. 308. Cocke 6. 226. 12 Wm 104. Co. L. 132. 3. 1 S. 443. 357. 1 H. Bl. 346.

As if the Husb. is a Foreigner, & has remained abroad some years without returning it is like abjuring the realm or deserting it. 2 Esp. 554. 587. 1 S. 443. 357. 1 S. 443. 50. 2 S. 443. 233.



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In case of a Divorce, a man or a woman who the wife  
may contract as a feme sole, 1 Esp. 26. Allen 660.

So if the Rev.<sup>d</sup> lives abroad and she be as I have  
married. 1st of 357 1/2 N. 1. 30. via St. Annara v. Fisher 3 Ex. Car. 20 d. 1/2.

If the hus.<sup>d</sup> & wife are separated under articles of agreement & the wife has a separate maintenance she is liable even at C. S. to the extent of her contracts. 17 V. S. 3a Ch 116 S. 20. 682. 5 H. 605. 4 H. 766. 8 H. 545. Br. Ch. 377. 1 H. Br. 633. 4 Arg. 334. 347. 8. 350. Esp. Ch. 6. 2 Br. Ch. 1079. 1195. 2 N. B. 148. This is now overruled. She is not liable. Nor is her pro-  
perty liable in Equity except by virtue of an express agreement on her part. 2 N. B. 163. 100517. 1 Br. Ch. 16.

Now is her hus<sup>d</sup> liable even for her necessaries  
if he duly pays the stipulated maintenance or allow-  
ance. 12 Mod 244. 1 Bac. Cases & Term. H. 1 Lalk 116.

If he does not he is liable for her necessities, the  
duty of separation notwithstanding. <sup>b B2P 147</sup> 2. Nov. 192. Mass. C.C.

Equity is the proper forum, as Chancery can act upon the subject matter. 2d. as to the remedy in Equity which she has made, an express agreement at supra. 103.

In an action at Law Farwell v. Brooks the wife  
alone was held liable, tho' the hus<sup>d</sup> was within the  
realm but was not liable for her necessities, there  
being a separation. \* This overrules the celebration  
of Corbett v. Schmidt. 1 Bos. & P. 79. 80. 100. Cook v. L. 28. sa H. 24.  
Lady Dancourts Case. 2 Str. Ch. 585. 387. 504. 126.

A few Court living separate without separ.

\* Incorrect. Miss Lewis <sup>never</sup> ~~was~~ <sup>could not</sup> agree. Besides, Maxwell & Paul's was first applied case

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ale, property, & as never liable to be sued alone for her contracts. In the 2<sup>d</sup> case of T. 22. here cited there was neither separate property, or an agreement to live separate. 4 T. 60. 266. 6 H. 604. 5 H. 682.

Wife living separate from hus. in adultery, is liable for her contracts herself: 10 B. & C. 338.

If a Feme Covert, living with her hus. alone receives a fine, or suffers a recovery, he may defeat it during her life (or after her death if he is tenant by curtesy) by entry, tho she cannot. 2 Br. Ct. 386. 1 Pow. C. 22. 1 H. 18. 341. 1 M. 346. 1 Co. 1 Bac. 301. 10 Co. 43. 7 Co. 225. 7 Co. 8. 6 Co. 40. 1 Com. 560.

And as in Eng. a freehold cannot be created by common in futuro, & as the hus. has the sole usufruct of the wife's real estate, & the sole disposal of her personal property, she can in no instance, dispose of her property by act executed, except of that which is to her sole & separate use. She may devise choses in action.

If the wife having separate estate, permit the hus. to receive or use the rents & profits, if it be real, or the interest if it is personal, she is considered in Eng. as having abandoned the rents &c. to him, & cannot afterwards recover them.

The presumption may however be rebutted by parole proof that he was to enjoy but for a certain time, or a particular purpose, &c. 1 Pow. 422. 3. 2 P. W. 82. 1 Atk. 269.

I observed before, that the hus. cannot defeat gifts to the wife's sole & separate use. Nor can he



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defeat a descent of real property. Doubtless whether he can devise. If he neither agrees or disagrees, her purchases are good during coverture. Co. L. 3. 356. 2 B. 272. 3. Rom. 356.

After coverture, the wife may dissent from and defeat her purchases or ratify them as she pleases, & this whether the husd<sup>d</sup> did assent or not. 1 Rol. 349. Co. L. 3. 356. Doug. 435. Esp. 291.

Her representatives have the same right, if at her coverture, she did not make her election. Co. L. 3.

If the husd<sup>d</sup> & wife are made tenants in common she may disagree to the purchase after coverture. 1 B. 272. 3 Co. 25.

In Conn. a power may be granted to commence in futuro, provided the first limitation is to a person in esse at the immediate issue of such person. It may then be a Dev. if the wife may not here grant by deed her own power, to commence in futuro. The fee is absolutely hers. No marital rights are affected, as she incurs no liability, does not violate the husband's right to her property - nor to her person. Stat. C. 24.

It is decided that in Conn. she may devise her real estate, to commence after the right of the husd<sup>d</sup> has ceased, & the objection of coercion is no stronger in one case than in the other. Now overruled. Pitot v. Prunard C. of errors. - By a new Stat. she may devise - may execute a natis authority - so she an interest.

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also passes to her, provided the authority is collateral to the interest, & does not flow from it. They are then unconnected, as if granted to different persons. 4 Cruise - 21. 236. 7. Co L. 112. 2. 18 & 192.

### Of Agreements between Husband and Wife.

It is a general rule of C. L. that all Contracts between the Hus. & Wife are void. and that those made between them before Coverture are dissolved by inter-marriage. (Qw. is the marriage contract dissolved?) Co L. 264. 112. Bro. C. 551. 18 L. 442.

The reason assigned for the rule is, that the legal existence of the wife is merged, & that they become one person. 18 L. 442. The true reason is generally that the right & obligation would meet in the same person, & that a recovery if obtained would in many instances be nugatory by reason of the right of the husband to the wife's property. There are exceptions to the rule, consistent with the latter, tho not with the former reason. Salk. 326.

If the wife of the Def. becomes Executor or Adm. to the plff. the action is destroyed. So if the Def. had been taken in execution by the original plff. he must be discharged. - (Consider) 8 D. 407.



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### V. Contracts between Husb.<sup>d</sup> & Wife during Coverture.

At C. S. no contract between the Husb.<sup>d</sup> & Wife respecting personal property is valid, for the reason before given - and the C. S. does not recognize a right in the wife to hold personal property. Cook B.S. 25. 1 R.R. 9. 1 R. 100. 336. 345. 6. 1 Bow. 84.

A Deed of Land from the Husb.<sup>d</sup> to the Wife directly, would at C. S. be void (as observed before for the same cause - i.e. the husband's right to the property. The control & usufruct w<sup>d</sup> still be in him. Co. S. 3<sup>d</sup> n. 1. 112. 1 Bow. 84. 4 Co. 29.

But it is now settled in Chancery (as ante. that the H.<sup>d</sup> may settle property to the sole & separate use of the wife during Coverture - & that her agreements respecting that property, even with the husband, are binding. That she cannot hold personal property to her separate use, obiter. - Re. Chy. 44. 2 Brs. 669. 191. n. 2 Brs. 64. 1 Alk. 270. 10 R. 10. 126. 1 Br. Ch. 16. 1 Font. 90. 1102. 2 Mass. 16. 159. 6 Bro. P.C. 156. 1 Brs 163. 517. 1 Day. 221. 235.

A conveyance by the Husb.<sup>d</sup> to a third person to the use of his wife is good at C. S. Since the Stat. of Uses Hen. 8. a conveyance may be virtually made directly to the wife by the husb.<sup>d</sup> without the aid of Chancery. The deed vesting the use - the Stat. the possession. 2 R. 337. 342. 332. 3. Co. S. 3 a. n. 1. 112. 4 Co. 29.

So if the husb.<sup>d</sup> to encourage the industry of y<sup>r</sup> wife engages to allow her a part of the avails of it, the promise may be enforced in Chy. 30 R. 337. Font. 92. contra 1 Day 221.

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She sues her Hus.<sup>d</sup> in these cases by her next friend.  
1 Atk. 278. Pre. Ch. 496. 2 Eq. Co. ab. 150. 2 New. R. 168.

Donatio mortis causa from the hus.<sup>d</sup> to the wife is good in Chancery or law, if the hus.<sup>d</sup> dies. It is considered in the nature of a testamentary disposition. Co. L. 9. a. n. l. 1<sup>st</sup> W. 441.

If the hus.<sup>d</sup> covenants with the wife not to interfere with her estate, he is estopped from doing it - and she is not left to her covenant. (i.e. I suppose, says J. Thorne she may obtain an injunction v. him.) I find no authority. It seems to be established at Law. 176. Bl. 334. 341. 351.

As was before observed, articles of agreement between the hus.<sup>d</sup> & wife to live separate, are enforced both in Equity & at Law to the extent of the agreement & no further. 2 Vent. 217. 8 Mod. 22. 2 Burr. 386. 671. 2 Bro. Ch. 377. 3 H. 614. 32 H. 5. 2 East. 283. 10 Burr. 542. 1 Fost. 105. 176. Bl. 334. 351. 1185. 285. Hal. Corp. Stra. 478. (If the hus.<sup>d</sup> having relinquished his right to the wife's person should confine her &c. she might be relieved by Habeas Corpus. I think Trespass w.<sup>d</sup> not in such cases lie v. the hus.<sup>d</sup> by the wife. Last auth.)

Any property therefore after separation coming to the wife will be just so far at his disposal, as if there was no separation, unless the contrary is expressly stipulated. 1 Pow. C. 80. 100. anticipated.

A feme covert may execute a power or authority given by the Husband, or by any other person, or retained by herself, to convey or devise an estate, if the estate is settled by way of trust, or her use. In this case, she



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conveys only the equitable interest which is not within the Stat. Hen. 8. taking away her power. 5 Com. 567. Pow. D. 180.

As an Estate to the use of H. (juno. coat.) for life, remainder to the use of such person, as she by any writing 1<sup>o</sup> shall appoint. 1 Vol. 329. 2 Vol. 75. 191. 610. 6 Bro. C. C. 156. 1 H. Bl. 346. Salk. 39. 134. Co. D. 112<sup>a</sup>.

So by way of trust, she can dispose of real property of the hus. or of any one else. As an estate conveyed to trustees in trust for her separate use for life, remainder &c. It seems she cannot devise, or execute a power in any other way. Pow. D. 180. Bro. C. C. 192. 2 H. Bl. 692. 695.

But a power to convey by deed she may execute without a user &c. But not if the power is over her own interest. Pow. D. 312. May 80. Salk. 11. 139. 135. Salk. 234. 1 H. Bl. 172.

In these cases the appointee (or person taking the estate under the execution of the power) is considered as taking by virtue of the devise &c. giving the power, through the person executing the power. See "Devises," &c.

A voluntary settlement by the husband on the wife after coverture, is void as to subsequent purchasers knowing the facts, as being fraudulent by Statute, 27. Elizabeth. Corp. 278. 5 Co. 50<sup>b</sup>.

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### III. Of Contracts between Hus. & Wife before Coverture.

It is regularly true, that if the hus. is indebted to the wife (or vice versa) before coverture, the intermarriage extinguishes the obligation. 1 B. & C. 442. Cro. C. 551.

Suppose the Hus. is indebted to the wife by bond before marriage, & he dies & leaves the bond uncanceled. the general opinion is that it will never revive. for a personal contract once suspended is forever extinguished. 2 H. B. 10. 1 B. & C. 442. Cro. C. 551.

If an obligee marries one of several co-obligors, & whole debt is discharged, because one co-obligor is freed. Cro. C. 551. 1 Fort. 93.

As to the first general rule, a distinction is to be observed between contracts which do & do not create a duty on the hus. during coverture. e.g. a covenant or promise to leave the intended wife a sum after the husband's death, is admitted to be good at law as well as in Equity. because there is here no debt during coverture, & therefore the right & duty do not meet in the same person. i.e. hus. Salk 325. 6. 1 Fort. 93.

As to a bond before coverture conditioned to leave the wife a certain sum, there has been much difference of opinion as to its force at Law. the penal part being considered a debt. That such bond is good in Ch. as evidence of an agreement admits of no doubt. 2 Vent. 343. 2 P. W. 243. 1 Bac. 292. 2 Vern. 480. 295. 2 Atk. 47. Pre Ch. 237.

Such a promise to leave property to the wife made before marriage was adjudged good as early as



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Crooke's time, and Hobart's. So of such a bond: Cro. J. 571. Hob.  
216. Hull. 17. Corn. 67. 10 Rep. 347. 2 H. 407. Salk. 320. S. C. Cart. 511. contin.

This point was however considered doubtful till  
very lately. Such a bond was regarded as void at Law  
in the Chancery cases cited above. So by the Edition of the  
late Edition of Bacon. 2. P. W. 243. 5 T. R. 383. 10 B. 291. 2.

It is now settled to be good even at Law. 5 T. R. 381.

Another exception to the first rule is; The wife may  
by accepting a jointure (i.e. a competent livelihood of her  
hold, for the wife in lands, tenements, &c.) before marriage  
bar her right of dower. The subsequent intermarriage  
is never considered as extinguishing such agreement. Co.  
L. 36. 4 Co. 1. 2.

The Eng. Law as to barring dower by jointure is  
regulated by Stat. of Uses, 27 Hen. 8. 2 B. C. 140.

Requisites of a jointure are,

1. It must take effect immediately on the husband's death.
2. Must be for the life of the wife at least & not per annu &c.
3. Must be made to herself, & not in trust for her.
4. Must be expressed to be in satisfaction of her whole dower.

It is doubtful whether in Conn. a jointure may con-  
sist of personal property. "Some other Estate" in the Stat.  
probably means a larger Estate than for life. Decided  
that it may not, Sup. Ct. Fairfield Cy. 1810. Stat. C. 147.

If a jointure is settled after the marriage, the  
wife may on the Husband's death accept or refuse it, &  
take her dower, but she may not take both. 2 B. C. 138.  
2 B. C. 140, 1 Bulst. 137. Dy. 358.

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If the wife agrees to accept a gift by devise instead of dower, she may after coverture, is determined accept or refuse, and generally she may take both, unless the devise is expressed to be in lieu of the dower. For parole proof is not admissible to shew the intention. Decided differently by S<sup>r</sup>, his decree reversed by Wright, & in Dow. Proc. 4 Co. 4. S. Cro. E. 128. Pow. D. 480. S<sup>r</sup> Ray. 433. 60 S. 366. S<sup>r</sup> Ray. 433. 1 Eq. C. ab. 217. Pow. D. 480. 2 Vern 366. 1 For. C. C. 593.

An exception is, that tho the devise is not expressed to be in bar of dower, yet the wife cannot take both dower & devise, if the hus<sup>d</sup> has devised all his other property. This fact is proof of his intending the devise as a substitute for the dower. S<sup>r</sup> Ray. 438. Cro. E. 128.

It is now a general rule that marriage settlement agreements before marriage, or after, are binding in Chancery. 1 Pow. 444. 2 H. 255. 2 Vern 480. 493. 1 Forb. 87. 2 Atk. 97.

## Miscellaneous Rules.

If the hus<sup>d</sup> & wife join in a lease, or other conveyance of the wife's estate (for more than 21 years I suppose) she may after she becomes discreet ratify or annul it, as when she leases alone. (ut antea) 1 Rob. 349. 1 Bac. 302. Rob. 225. 2 Inst. 673.

If an obligation be given to the Baron & Femme, she may refuse the benefits of it, after the husband's death



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After such waiver, it enures to his representatives, as an obligation to him alone. 1 Pol. 349.

If at C. S. husb. & wife are made tenants in com.<sup>m</sup> she may disagree to the purchase or gift after his death. But if it be a freehold, a disagreement by parol is not effectual. 1 Pol. 349. 3 Co. 26.

In Eng. she may disagree by a B. of Record, or suppose by deed. Entry & taking profits is a good agreement.

If an estate is given to the husb. wife & a stranger the husb. & wife have but a moiety; & if either of them die the survivor will take one whole moiety, & the stranger the other. 11 Vin. 552. Litt. 291. Co. L. 187. 327.

If real estate is conveyed to the husb. & wife, they take by entireties & not by moieties. The husb. then cannot by his own act alienate even a moiety; for he cannot sever the joint interest. 1 Com. 582. 5 T. R. 654. 2 Sw. 39. Co. L. 191<sup>a, b</sup>. 9 Co. 140. 2 Vern. 120.

A fine or common recovery suffered by feme alone is good w.<sup>th</sup> her & her heirs (at antea). But the husb. may rescind it during coverture, or after. 1 Bac. 302. 1 H. Bl. 341. 1 Hol. 346. 350. Co. L. 43. 10 B. 229.

These are the only conveyances of former courts to which at C. S. they cannot disagree to defeat after coverture.

If the husb. join her, the conveyance is good to all intents. It is doubted by some whether the husb. & wife can convey by recovery. 1 Bac. 302. 1 Fonl. 300. 2 Co. 747. 10 Co. 43.

If the wife makes any other than a judicial conveyance, & does not expressly or impliedly confirm it after cov.

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Coveture, her heirs may defeat it after her death.  
Co. L. 3<sup>a</sup>.

The reason that a judicial conveyance alone is binding, is that the wife on the face of it appears as a feme sole, which the Ct. will not afterwards permit her to contradict. 1 Pow. C. 22.

If the wife is injured in her person & the husband sustains consequential damages, he has a right of action vs. the wrong doer. as for battery, false imprisonment, slander &c. For the direct injury she must join. Cro. J. 501. Cro. C. 89. 2 Roa. 556. 1 Sw. 140. Salk 206. 1 Com. 572.

In case of adultery he may maintain an action alone - but in this case proof of actual marriage is necessary. Esp. 342. 4 Burr. 2057. Bull. 278. Doug. 162.

The hus. cannot maintain an action for adultery committed with his wife, after separation by agreement. for he thereby relinquishes all right to her person, & of course the alienation of her affections is no injury to him, neither is his family disgraced by her actions. 1 Burr. 542. 5 Tr. 387.

According to the old C. L. the hus. might give his wife moderate correction. 1 Bac 285. 1 Sid. 113. 116. 1 Hawk. 130. 1 Bl. 471.

But according to the old law if he beat her violently, or even threatened to do it, she could bind him to the peace, by writ of Supplicavit in Ch'y. or might obtain a divorce propter servitium. Moor 874. 1 Bac 285. 3 Mod 22.

Now no violence is allowed. but if the husband beats his wife at all, she may bind him to the peace at



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Law - & vice versa. The husband's power over the wife was first impaired in the reign of Hen. 2. 1 Sid. 113. 3 Nel. 433. 2 Ser. - 128. 1132. 448. 1 Bac 235. n. 1136. 448.

The husd<sup>d</sup> may still restrain his wife of her liberty in case of gross misbehavior, as from destroying his property, keeping lewd company &c. Str. 478.

But in case of unreasonable confinement, she may be released by habeas corpus. 11 Bur. 634. 542. Str. 478.

The husd<sup>d</sup> is justified in a battery in defence of his wife, & vice versa. Bat. 18. Esp. 314. 318. 2. 16. 62. Cro. J. 239.

If a feme sole makes a will or devise & afterwards marries, & dies before her husd<sup>d</sup> it is revoked. 2 B.C. 499. 2 P.W. 624. 4 Co. 60. 2 T.R. 695.

But if she survives the husd<sup>d</sup> it then revives for she might have revoked it if she would. Godol. 692. Dougl. 343. arg<sup>d</sup>. 2 W. Alton 381. 2 T.R. 684.

## Of the mutual disability of the Husband & Wife to testify for or against each other.

A general rule that the husd<sup>d</sup> & wife cannot testify for or vs. each other. The reason assigned for this, that they are one person. And one maxim is, "nemo testis debet esse in propria causa". Another is, "nemo tenetur sese accusare." 60 L. 5. 2 Haw. P.C. 31. 1136. 443. 4 T.R. 678.

But the true reason is, they may not testify for each other, on account of union of interest. nor vs. each other, on motives of policy, to keep family peace. This is

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is indeed admitted in some of the Books to be the reason.

1 M. & A. 162. 8. q. 1. Co. L. 6. b. Esp. 720. Bul. 280.

The husb. cannot testify even to his interest where his wife is concerned. E.g. property settled to the wife's sole & separate use, was taken for the husband's debt. On an action to the Chff. the husb. was offered as a witness by the wife's trustee & rejected. 4 M. & A. 678. Esp. 720.

Neither of them are allowed in any case even to examine other parties to give evidence tending to criminate the other. E.g. Where in settlement cases, or others, marriage is disputed on the ground of a former subsisting marriage the lawful wife is not admitted to testify to the former marriage, as this would charge the husb. with bigamy. This shows that their legal identity is not the governing principle. 1 M. & A. 161. 2 S. Ray. 752. 2 M. & A. 263. Ray. 1. Hale 693. Esp. 720.

A general rule that a person may testify to himself & with consent of the opposite party for himself. Not so in case of husb. & wife. This shows the same as to their legal identity. 1 M. & A. 164. Hardw. 264. 1 S. Ray. 1. 2 Co. L. 6. b.

### Exceptions to the first general rule.

1st. In case of Treason, husb. & wife may testify in each others case. Ray. 1. 2 Haw. 608. 1 Brownl. 47. 2 Rib. 403. Hale 48. Bul. 280. Contra 1 Hale 301.

2nd. Where the wife exhibits a complaint to the husb. to bind him to the peace, (as she always may) she may from necessity testify to him & vice versa. 2 Haw. 432. Esp. 721. Bull. 287. 1 Burr 542. 1 Bl. 443.



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3<sup>rd</sup>. When one is prosecuted for personal abuse to, or other  
the abused may from necessity, testify. This point is not  
settled by our Sup<sup>re</sup> Ct. but the principle of S<sup>r</sup>. Audley's  
case has been adopted by one of our County Courts. Hutt.  
113.6. 1 Mc. N. 145. 17<sup>2</sup>. 1 Stra. 633. Bull. 287. 2 Haw. 308. Esp. 721. contra  
J. Ray. 1. 1 Mc. N. 161.

A woman forcibly carried away & married is wit-  
ness to her husb<sup>d</sup>. to prove the fact. This is hardly an ex-  
ception, as here is indeed no marriage. Such a trans-  
action is felony, under the Stat. 3 Hen. 7. Cro. 488. Esp. 721.  
Bul. 286. 1 Bl. 443. 470.

5<sup>th</sup>. If a man marries, having a former wife  
living, the last wife may testify to him, as she is no  
wife. Bull. N. O. 287. Esp. 721. Is this an exception? I dare

6<sup>th</sup>. In actions between other parties (i.e. where the  
husb<sup>d</sup> is not a party) the wife has been admitted to give  
such evidence as would indirectly charge her husb<sup>d</sup>.  
civiliter. e.g. In an action (for wedding clothes) &c  
one, his wife's mother was permitted to swear, that they  
were procured, on the credit of her husb<sup>d</sup>. 1 Stra. 504. Bul.  
287. Esp. 721.

It is otherwise in criminal cases, where the evi-  
dence would tend even collaterally to criminate the  
husb<sup>d</sup>. 1 Mc. N. 161. 2. 2 F. O. 288. 1 Hale 301. 1 Mc. N. 168. 92. 1 K. 752.

Now can she testify when the evidence w<sup>d</sup> operate  
indirectly in his favor. e.g. On indictment for conspir-  
acy the wife of one of the Defts. cannot testify for the  
other. 5 Esp. 107. Swi. ev. 91. 4.

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7<sup>th</sup> Declarations of the wife, as to transactions immediately within her province, have been admitted to be proved to charge the husband. e.g. Declarations that she had agreed to pay a certain sum for nursing a child. (Is this Law?) 1 Stra. 527. Esp. 721. Bull. 287. Park v. 174. 5. 1 Note

In what cases Husband & wife should join in bringing actions. and in what cases the Husband may or must sue alone.

In some cases the Husband must join the wife - in others he may or not at his election - and in some he cannot join her. It is difficult to reconcile all the cases. 2 Wils. 423.

1<sup>st</sup> A general rule: That the wife must be joined when the right of action would survive to her after his death. 1 Wils. 224. 1 Rol. 347. 3 T. R. 631. 1 Com. D. 575. 576. 1 Bac. 304.

Because if the husband might sue alone, he would by commencing the action, attach a sole right of recovery in himself, & thus oust the wife of her legal right. 1 Fonbl. 309.

In actions real for the recovery of the wife's land, they must join. 1 Com. 576. 1 Buttr. 21. 1 Bac. 304. 1 Rol. 347.

So also in ejectment to recover the wife's land or chattels real, for on his death they survive to her. Buttr. 21. Esp. 404.

So in suits on the wife's choses, which she had before marriage. 1 Com. 576. 1 Rol. 347. 53. Cro. E. 537. 3 T. R. 631. 2 Atk. 208. 1 Burr. 396. 3 Atk. 21. 2 Ser. 107. 2 Wils. 423. Moore 422. Contra. Cro. E. 133. Esp. 219. 3 Ser. 403. 7 T. R. 347.



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So to recover rent due to the wife while sole. Co. L. 55.  
Rol. 347. 318. 348. 1 Com. 571. Cro. E. 700.

So upon promises made to the wife while sole 1 Com.  
571. 1 Sid. 28.

So for injury to the person of the wife during cover-  
ture; as Slander, assault & battery. 1. Rol. R. 360. Esp. 316. 2 L.  
Ray. 1208. 1 Com. 572. 1 Bac. 306. 1 Vent. 328. Cro. E. 501. 538. 600. infra aut.

So for waste on the wife's land during coverture. 1 Com. 572.

So in an action of Trespass, for cutting wife's trees dur-  
ing coverture, they ought to join. Burnb. 277. 1 Com. 572. 2 Moor  
432. 2 Wils. 424. Cro. E. 96. Vent. 195. Contradicted by Polley, &c.

This case may have been for emblements - An action  
for destroying emblements on the wife's lands, (as common  
garden vegetables) does not survive. Cro. E. 133. That the  
husb. may sue alone or join (in this case) the wife. 1 Com.  
575. 2 Vent. 195.

So in Trespass for destroying grass, or injuring it,  
on the wife's inheritance, during coverture, it is said  
they may join. 2 Wils. 424. Cro. E. 96. Burnb. 277. 1 Com. 572.

So in an action of Trover for the recovery of the wife's  
property, if the conversion is before coverture, she must  
be joined. for this is a chose in action, & will survive to  
her. 3 T. R. 631.

So in general for injuries done to the person or pro-  
perty of the wife while sole, as battery, slander &c. 3 T. R.  
627. 1 Bac. 306. 1 Rol. 347. Moor 422. Rol. R. 360. vide supra aut.

In all these cases she must be joined, because it sur-  
vives to her on his death, which is the criterion.

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If the wife properly be taken (lawfully) before co-  
verture, & converted afterwards, the husband & wife may join  
in Trover, or the hus.<sup>d</sup> may sue alone. 1 Bac. 289. Salk. 114.  
1 Com. D. 514. 1 Vent. 261. 1 Lev. 107. - The Ct. were divided on  
this subject - two judges said the wife ought to be joined -  
others thought the hus.<sup>d</sup> ought to sue alone. 1 Sid. 802. - L.<sup>d</sup>  
Mynon seems to think the wife ought to be joined. 3 Ff. 631.

The hus.<sup>d</sup> may bring an action of Detinue alone, in  
case of larceny or finding the wife's goods - for he has the  
absolute possession. 1 Sid. 172.

In an action of Trover by the hus.<sup>d</sup> & wife, the conver-  
sion should be laid to the husband's damage only. Salk. 114.  
1 Bac. 307.

The wife may not sue alone, because she cannot  
appoint an attorney - & should the Deft. recover, he could  
not take her on execution, as it would violate the mar-  
ital rights of her hus.<sup>d</sup>.

2<sup>nd</sup> But if the hus.<sup>d</sup> distrains for rent due to the  
wife while sole, & a rescue is made, he may, at his  
election, sue alone for the rescue, or join the wife. He  
may consider the rescue as a tort to himself. Cro. E. 459.  
Moor. 584. 422. 1 Com. 574. 1 Bac. 304.

So in an action of debt or covenant for rent ac-  
cruing out of the wife's land, during cov.<sup>t</sup> 1 Com. 573. Palm. 207.

Why is not hus.<sup>d</sup> obliged to join the wife in the last  
case? The rent would survive to her. Com. 557. 1 Mol. 350 Es.  
7. 11. 14. 17. 18. 19. 692. Moor. 887.

So if a bond is given to the hus.<sup>d</sup> & wife during cov.<sup>t</sup> or =



## Husband and Wife.

cverture, he may sue alone, or join the wife. 1 Bac 305.  
2 Ves. 675. 1 Com. 574. 1 East 432. 3. 3 Esp. 267. And yet the bond  
would survive to the wife, if the hus<sup>d</sup>. sh<sup>d</sup>. die without dis-  
agreeing to her interest, as in this case, he may. Query.  
It vests in him. Allen 236. 2 Ves. 675. 7. 1 East 432.

So if a bond be given to the hus<sup>d</sup>. & wife as Execut<sup>r</sup>.  
he may sue alone or join her - for he has a right to ad-  
lect & account for it, & yet this bond would survive to her.  
4 T.R. 616.

So on a covenant accruing to the wife, as reversion  
in fee during coverture. But in this case, he must  
declare on a feisin in fee in himself & wife, in right of,  
his wife, or it is ill on special demurrer. Doug 314. 1 Saund.  
250. 3. 2 Lutes. 1421.

So if a bond &c. be given to the wife alone, during co-  
verture, the hus<sup>d</sup>. may sue alone or join the wife. 3 Lev.  
403. 1 Warr 396. 1 Com. D. Baron 1<sup>o</sup>. W. 573. 4. 1 Bac. 305. 2 Ves 676. 1 Hol.  
20. 32. 2 Mod 217. 3 Esp. 266. This survives to the wife. 2 Ves.  
676. - Qu. 3 Esp. 266. 1 East 432.

Suppose a Legacy given to the wife during coverture,  
the hus<sup>d</sup>. may sue alone for it, or join the wife - for it  
does not survive to the wife. 1 W. 132. 108. 1 Mod 179. 2 Hol. 139.  
1 Com. 555. 5 T.R. 692. - Qu. 1 W. 132. 109. 1 Atk 458. 9. 3 Esp. 266. 1 East.  
432. 4. Robt. Fr. Con. 287. 8. - That it does survive, see 2 Ves. 676.

If the wife is the meritorious cause of action, & a promise  
is made to her during cov<sup>t</sup>, she may join in the action dur-  
ing, in some cases, tho the cause of action does not survive to  
her. Crof. 77. 205. 2 Com. D. Baron, & C. 251. 2 Sid 128. Cro. E. 61. Cro. 644. 2 Wils. 424.

## Husband and Wife.

But not without an express promise; i.e. in assumpsit on a contract during coverture. Salk 114. 4 Mod 156. Barnard 75. 249.

It is said in Bro. J. that the action survives in this case to the wife: but not law. The reason given is that she may join because the hus.<sup>d</sup> affirms the promise to<sup>r</sup> wife by joining her - i.e. he agrees that the wife may take the benefit of it. Bro. J. 77. Contra. Salk 114. 1 Com 572. Bro. E. 61. 2 Bl. R. 1209.

In 2 Bl. R. 1239. the case in Bro. E. 77. is said to be shaken, but the Ct. recognize it as law.

The husband & wife cannot join in assumpsit, without stating the wife's interest.

3<sup>rd</sup>. When the wife is the suffering cause of action & the hus.<sup>d</sup> sustains consequential damages, she cannot be joined in an action but for such consequential dam.<sup>s</sup> As in case of Slander of the wife with special damages to the hus.<sup>d</sup>. So in case of assault & battery. These actions are called per quod. The action which he brings w.<sup>d</sup> not survive to the wife. 1 Lev. 140. Sid. 346. 1 Com 572. Salk 206. Bro. E. 89. 2 Rol. 556. Hil. 791. 2 H. 387. Bro. J. 501. 538. 1 Bae. 306. 1 Com 573.

This latter action (ass.<sup>t</sup> & bat.<sup>y</sup>) has generally been called trespass vi et armis - but it is strictly trespass on the case. See title. Parent & Child. p. Esp. 645. 2 Bl. 167. 1 Law of N. P. 9. 13.

If battery is committed upon the hus.<sup>d</sup> & wife they cannot join for the whole injury - for the wife's battery they can - he must sue alone for his direct injury - & for his consequential injury per quod. 1 Com 573. Bro. J. 555. 501. Jon. 440.

But if in this case separate damages are given for the battery of each, the hus.<sup>d</sup> may release as to his battery.



## Husband and Wife.

Then (it being after verdict) he may have judgment with the wife for her battery. 1 Vent. 328. Crof. 655. 1 Com. 576.

So if the Dife. is found<sup>d</sup> not guilty as to the hus.<sup>d</sup> & guilty as to the wife, the verdict is good, (but would have been ill on general demurrer. An exception to the rule that a verdict will not cure itself of misjoinder.) Howard. 166. 2 Vent 29. Crof. 655. 1 Com. 576.

The hus.<sup>d</sup> may sue alone on a promise (made to him in consideration of forbearance) to pay a debt due to the wife, while sole. 1 Com. 512. Crof. 110.

So also if due to the wife as executrix, "auter droit." Salk 117. Carth. 462.

So the hus.<sup>d</sup> may sue alone for adultery with the wife. many circumstances will aggravate the damages. as e.g. the rank of the plff. his wife's previous good character. the peculiar turpitude of the Dife's conduct. Esp 342. 4 Burr. 2057. Bul. 27. Doug. 162. 1 San. of N. H. 9.

Many circumstances also mitigate damages. as that she had eloped before - she was a prostitute - the hus.<sup>d</sup> turned her out of doors - he was familiar with other women, &c. Bul. 27. 4 T.R. 651. 4 Esp. R. 16. 1 San. of N. H. 11.

If the hus.<sup>d</sup> consented to the act. or if he permitted his wife to live as a prostitute, the action does not lie. Bul. 27. 1 San. of N. H. 10. 11. 4 T.R. 651.

An action of Trespass by the hus.<sup>d</sup> alone; for breaking & entering his house & beating his wife, was good. for beating the wife was only matter of aggravation, while the breaking & entering constituted the gist of the action. Stra. 61. Esp. 407.

## Husband and Wife.

And opposed to the last rule, an action by  $\eta$  husband & wife for imprisoning the wife, per quod the husband's business remained undone, to their damage, was held good after verdict; per quod being only matter of aggravation. *Salk 119. 6. 110d 127. 11 Bac 306.7.*

If the husband sues alone when he ought ~~not~~ to join the wife, or joins her when he ought to sue alone, the misjoinder or nonjoinder is fatal & not cured by verdict. but would be good cause for motion in arrest of judgment. or the judgment might be reversed by writ of Error. *2 Bl. R. 1236. 110nt 328. Stra. 61. 229. Cro E. 133.*

But if the wife sues alone when she ought to be joined with her husband the Defendant can plead in abatement only & if he omits to do this he waives his right. *3 T. R. 627. 5 Com. 193. Sutor. 1641.*

The right of action being strictly hers, the husband may have a writ of error if judgment goes ~~to~~ her. *11 Bac. 307.*

If the husband & wife join in an action, & the declaration shows no reason for joining the wife, it is ill. *2. N. R. 405.*

That it is not aided by verdict, see *Cro J. 644. 1 S. L. 250. 2 New R. 407. 8. m.*



## Husband and Wife.

In what cases the Husband must be sued with  
or without the Wife.

I. A general rule: That the wife must be joined in actions, which w<sup>d</sup> survive vs her; otherwise the husb<sup>d</sup>'s representatives might be injured. e.g. If the husb<sup>d</sup> should be sued alone for debts, contracted by his wife & when some sole (for which he is liable only during coverture) sh<sup>d</sup> die pendente lite, the suit would survive vs his representatives, whereas it ought to vs her. 1 Bl. 443. 3 Mod. 186. 1 Rol. 351. Moor 701. Allen 35. 72. 7 W. 348. 1 Keb 281. 440. Cro. C. 366. Co. L. 351.

So for torts committed by her before coverture, for these survive vs her. 1 Com. 575. Co. L. 133. 351.

So for rent due from her before coverture. East aut<sup>h</sup>.

So in general in all actions, to which the wife was liable before coverture. 1 Bac 367. Co. L. 133. 1 Com. 575.

So for torts committed by her alone, without y<sup>e</sup> husband's privity, during coverture. Cro. C. 301. 1 Bac 307. 1 Com. 575. 1 Wils. 149. Stra. 1237. 1 Rol. 6. 1 Leon. 312.

If a lease be made to the husb<sup>d</sup> & wife, the action for rent accruing during coverture must be vs both. For if she should survive, she might confirm the lease, & I suppose then the rent w<sup>d</sup> survive vs her. 1 Com. 575. 1 Rol. 348. 40. 50. 1 Bac 307.

III<sup>d</sup>. But regularly when the cause of action w<sup>d</sup> not survive vs the wife, she cannot be joined. e.g. a feme sole, who is a lesser married, her husband must be sued alone for rent incurred during coverture.

## Husband and Wife.

For it survives vs the husb.<sup>d</sup> & not vs her. Where she cannot waive the lease after coverture & the husb.<sup>d</sup> has taken the whole benefit of it during coverture. 16 Com 575. T. Ray 8.

An action of Assumpsit vs the husb.<sup>d</sup> & wife on their joint promise is bad. The husb.<sup>d</sup> should be sued alone; for as to the wife the promise is void. Palm 313. 1 Com 575.

An action vs the husb.<sup>d</sup> & wife for battery committed by both, or by the wife alone through the husbands coercion, is bad. Cro. J. 661. 129. 1 Mol 348. 16 Com 575. Palm 343. Cro. S. 355. 184. 284. 401.

So in general for a tort committed by both, or by the husbands coercion during coverture, the husb.<sup>d</sup> must be sued alone - it is his act. 5 Com 194. 1 Mol 348 b. Yelv. 165. Stam. 1094.

So it is held bad, if the husb.<sup>d</sup> & wife, even if the husb.<sup>d</sup> is found not guilty, for he sh<sup>d</sup> be joined only for conformity, & not as participus criminis. In this case judg<sup>t</sup> may be arrested. Yelv. 106. 1 Com 576. 1 Brownl. 207. Contra Cro. J. 203. Vent. 93.

In an action of Trover vs the husb.<sup>d</sup> & wife, conversion must be laid to the husbands use only. a judg<sup>t</sup> may be arrested, or a writ of Error granted. 5 Com. 194. Cro. J. 661. Mol 6. 13 Jac 307.

If the wife is joined with the husb.<sup>d</sup> when she ought not to be, the action may be abated. So vice versa, and even if the mis- or nonjoinder is not pleaded in abatement, advantage may be taken after judg<sup>t</sup> by a motion in arrest, or by writ of Error. Yelv. 106. Cro. J. 203. Vent.

If a feme covert being sued alone pleads coverture & prevails, she may have execution for costs in her own name - or by scire facias, her husb.<sup>d</sup> & she may have them together. Doug. 614.



## Husband & Wife.

The wife when sued with her husd. cannot plead a  
lone, but the husd. must join. 2w. Suppos. she is sued alone.  
then it is otherwise. Esp. 313. Cro. J. 239. Doug. 614.

As to wife's relief when taken alone or with her husd.  
on marriage process &c. see page.

### Of the Wifes power to Devise.

By a Stat. in Conn. all persons of full age, of right  
understanding &c. not otherwise legally incapable, shall  
have full power to devise.

See the construction given to the words "all persons",  
in Stat. 32 Hen. VIII. See title "Devise" p.

Femes Covert. were incapable of devising at C. & E.  
whatever was devisable, if the marital right would  
not be impaired by such devise. Lyndw. 178. 2 East 552.

What then was their power to devise? It seems  
from the existence of two english customs, that at C. & E.  
whatever was devisable (before feodal tenures) they  
might devise lands. lands being devisable before  
the conquest. 2100. 377.

During the feodal tenures their property was  
devisable. & even by femes covert when they had proper-  
ty, over which the husd. had no control. 1. She might  
devise personal property, given by way of dower, ad.  
ostium ecclesie. 2. Choses in action, without the con-  
sent of the husd. But if with consent, it proves that there  
is nothing in the nature of coverture to prevent; but she

## Husband and Wife.

the husband's right to the property may interfere. Case in Mod. since Stat. 24 Car. II. by which the hus. is entitled to the wife's choses, after her death. Moor 1 Mod 211. 123. 2. And. 92. 1 Roll. 214. 176. Bl. 334. Brooken Devises 718.

3. Personal property to her sole & separate use. It may be said that as to this she is a feme sole. - why then, I ask, may she not devise land. 1 Ves. 518. 190. 303. 2 Ves. 75. 1 Bro. Cty. 10. 3 Atk. 695. 709. Pr. Cty. 204. 10. 10. 126. 740.

4. At C. S. she might bequeath such personal property, as would accrue to her on his death, & if she survive and the will w<sup>d</sup> be good. 2 East. 552.

So she might bequeath his personal property, with his consent. 176. Bl. 347. Bro. C. 219. 376. 10 Ves. 76. E. S. 101. 111. 387. 4 Atk. 73. (Bracton) 160. Bro. C. 219. 1. Mod 211. 1. Ves. 240. 2 Atk. 253. - Moor 340. 1 Hol. 608. 912. 10 Ves. 344. Leon 81. 3 Atk. 695. 2 Atk. 82. 316.

"Judge Rive thinks it politic for the wife to be permitted to devise her property - for (he thinks) she will then provide for some dependant relation or friend, of whom she has received assistance, which w<sup>d</sup> encourage persons to assist her - and (says the Judge) it is clearly not contrary to any principle of C. S. -

"(Stat. of Hen 8. precludes her from disposing by will of her real property, which shows that she might at C. S." (Judge Rive) - 2 Ves. 75. 3 Atk. 707. 9. Pr. C. 205. 10. 10. 126. 2 Atk. 316. 382.

"If the hus. & wife separate, & he gives up all claims to her real property, she may devise it. (Judge Rive.) 176. Bl. 334. Year Book 3. & 6. Edw. 3. -

"A wife may devise that which she holds in the



## Husband and Wife.

"right of another, as where she is excommunic. (Judge Blunt.) Moor

"340. 1 Holl. ab. 608. qm. 176. 130. Camp &

"In Eng. if the wife devise personal property, and  
"some comes to her after his death, it will pass as will  
"as her separate property. So also her paraphernalia  
"will pass." 3 alk. 695.

"In those States which have no Stat. similar to  
"that of Hen 8. I think the wife may devise her person-  
"al & real estate, provided her husband's rights are not  
"injured thereby." (Judge Tine.)

"If a wife devise her choses in action, & die before  
"they were collected, the devise is good - for by law they  
"did not vest in the hus? till collected. (Judge Tine.) Godolph.  
"692. (Now 352. 3. 2 C.R. 689. 692. Moor 381. 2."

Mr. Gould thinks a devise of any property would  
be good, if the wife were to survive the husband.

## Of the Celebration of Marriage.

Before the Stat. 26 Geo. II if persons not authoris-  
zed solemnized marriage Ec. of Kings Bench w<sup>d</sup> prohibit  
it the Ecclesiastical Ec. from treating the marriage  
as void. That Stat. provides that marriages contrav-  
ry to its provisions are absolutely void. 3 alk. 438.

"Yet that Ec. would not grant Adm<sup>n</sup> of the wife's  
estate to the hus? By this authority it w<sup>d</sup> seem void by  
the former good. 3 alk. 120.

In questions purely civil, when the fact of mar-  
riage comes into dispute, common reputation of the

## Husband and Wife.

marriage is sufficient proof. 4 Burr. 2057.

In case of crim. con. an actual marriage must be proved. "A part of crim. action," in Doug. 4 Burr. 2057. Doug. 152.

In Conn. if clergyman &c. celebrate marriage w<sup>o</sup> the Stat. the marriage is good, but a penalty is incurred. Qu. How if any other person solemnized it? Generally thought void.

### Of void and voidable marriages.

Impediments to marriage in Eng. are of two kinds,

I. Canonical impediments. These are consanguinity - affinity - imbecility - and previous contract, which seems to be abolished.

The impediments of consanguinity, affinity & imbecility are derived from the divine law. & therefore cognizable by the spiritual courts.

They are sanctioned however in Eng. by Stat. 32 Hen. VIII. which prohibits all marriages prohibited by Gods Law. It is declared in this law that nothing (except Gods law) shall prohibit any marriage, if within the Levitical degrees. These degrees are the standard as to consanguinity & affinity. Imbecility is an impediment in divine law.

Canonical impediments render the marriage only voidable, during the lives of the parties. afterwards Act of K. 13. will prohibit. Co L. 33. Salk. 545.

All persons linearly related are prohibited. Saugl. 242.

Among collateral the most distant degree is



## Husband and Wife.

that volume Uncle & niece, & vice versa. Gill. 11. 158.

Rules for ascertaining what marriages are lawful.  
1<sup>o</sup> among collaterals, so far as relates to consanguinity and  
affinity: Not to marry a collateral relation in the first  
or nearest degree, nor one related in the first or nearest  
degree to a relation in the first lineal or collateral re-  
lation, as the daughter of his former wife's sister. So  
in Conn. Co. 5. 228. Hob. 181. Co. 5. 230. contra note, same page.

If no divorce takes place during the lives of the  
parties, the issue is legitimate. Salk 12. 548. 11 Co. 360. East 271.

In Conn. a man may now, by the new Stat. mar-  
ry his wife's sister, & vice versa, which is a deviation from  
the old rule.

III. Civil impediments. These are. 1<sup>st</sup> A prior exis-  
ting marriage - 2<sup>nd</sup> Want of age - 3<sup>rd</sup> Want of consent  
of parents or guardians - 4<sup>th</sup> Want of reason - 5<sup>th</sup> Want  
of license &c.

1<sup>st</sup> A prior marriage will constitute a 2<sup>d</sup> Bigamy,  
which in Eng. is felony - & is here <sup>severely</sup> punished.

2<sup>nd</sup> Want of age. - The age of consent is 14 in males &  
12 in females. But those under this age may afterwards  
ratify the former marriage, without another ceremony.  
They may also disagree & rescind it without a divorce.  
If one is under age of consent, the other may disagree  
before it is ratified. 7 Co. 43. Co. 5. 79. 33. 6 Co. 22. Roll. at 340.

3<sup>rd</sup> Want of Consent of parents was no impediment at  
C. S. - but is made so by Statute.

## Husband and Wife.

The Law of Conn. is very different from the Eng. L. in several respects. 1. Marriage within the prohibited degrees, is absolutely void; of course issue is illegitimate also. 2. Want of consent of parents &c. does not render the marriage void; but subjects the clergyman &c. officiating to a penalty. In Eng. it makes void unless there is a publication of banns. Stat. C. 286. 1 Salk. 120. 537. 8. 490. 1 Comb. 548. 1 Sid. 64. 2 Lev. 376. 1 Salk. sup. 2 26437.

3. Previous contract is never known in our law; but if a person marry after entering into such contract with another, the injured party may recover redress in damages. 1 Bl. 435.

If a marriage celebrated in another State, between parties belonging to this State, & who leave it for the purpose of evading our law good here, the rule of our law not being complied with, the marriage is agreeable to the Law of the other State? 2 H. Bl. 147, 411. Bul. 114. Co L. 79. C. N. 80. C. N. 2 Burr. 1080.



## Husband and Wife. Of Divorces.

Divorces are of two kinds a vinculo & a mensura.  
The first is total, & a complete dissolution of the contract.  
The second, partial & does not dissolve the relation of  
hus. & wife, but merely separates them.

In Eng. a divorce a vinculo is granted only for the  
canonical impediments, (above) and those existing before  
marriage, as is always the case in consanguinity, ex-  
cept by act of Parlt. Not those supervening, as may  
be in affinity & similitude. 1 Inst. 235. 1 Salk 121. Roll 66. 5 Co. 98.

Causes of partial divorces in Eng. are adultery, Cruel-  
ty, & well grounded fear. Parlt. lately grants divorces to-  
tal for adultery. Divorces in other cases are granted by the  
ecclesiastical Courts. Cro. 462. Moor 6, 682.

Issue born after a partial divorce is presumed  
to be illegitimate, tho the presumption is rebuttable.  
In case of voluntary separation the issue is presumed  
legitimate. . . . . Salk 123. 4 Salk 356.

In Conn. divorces are ordinarily granted by the Supr.  
Ct. but total divorces by them only. The causes here are  
1. Fraudulent contract - 2. Adultery - 3. Three years wil-  
ful absence with a total neglect - driving the wife a-  
way by violent abuse, equivalent to a desertion - 4. Two  
years absence, unheeded of - 5. Three years absence on  
a voyage usually performed in three months, unheeded  
during that time - or heard of under such circumstances, as  
that we may infer the death, &c.

## Husband and Wife.

Legislature in Conn. may grant a total or partial divorce at their decision - & for these causes viz. fear & cruelty.

### How a divorce affects property.

In Eng. in case of divorce a vinculo, the wife has no dower, nor any support out of the husband's Estate. For "ubi nullum matrimonium" &c 2 Bl. 103.

After a partial divorce, for any cause she has her dower. Co L. 32.

She also has Alimony, or a maintenance, settled according to the discretion of the Judge. She does not require her right to her personal property by divorce; & if a legacy comes to the wife after such divorce, the hus. may claim & release it. Co L. 235.  
1 Lev. b. 6h. Ca. 44. 164. Moor 666.

"He may collect her choses in action, & is still jointly liable for her debts before marriage, & her torts before the divorce."

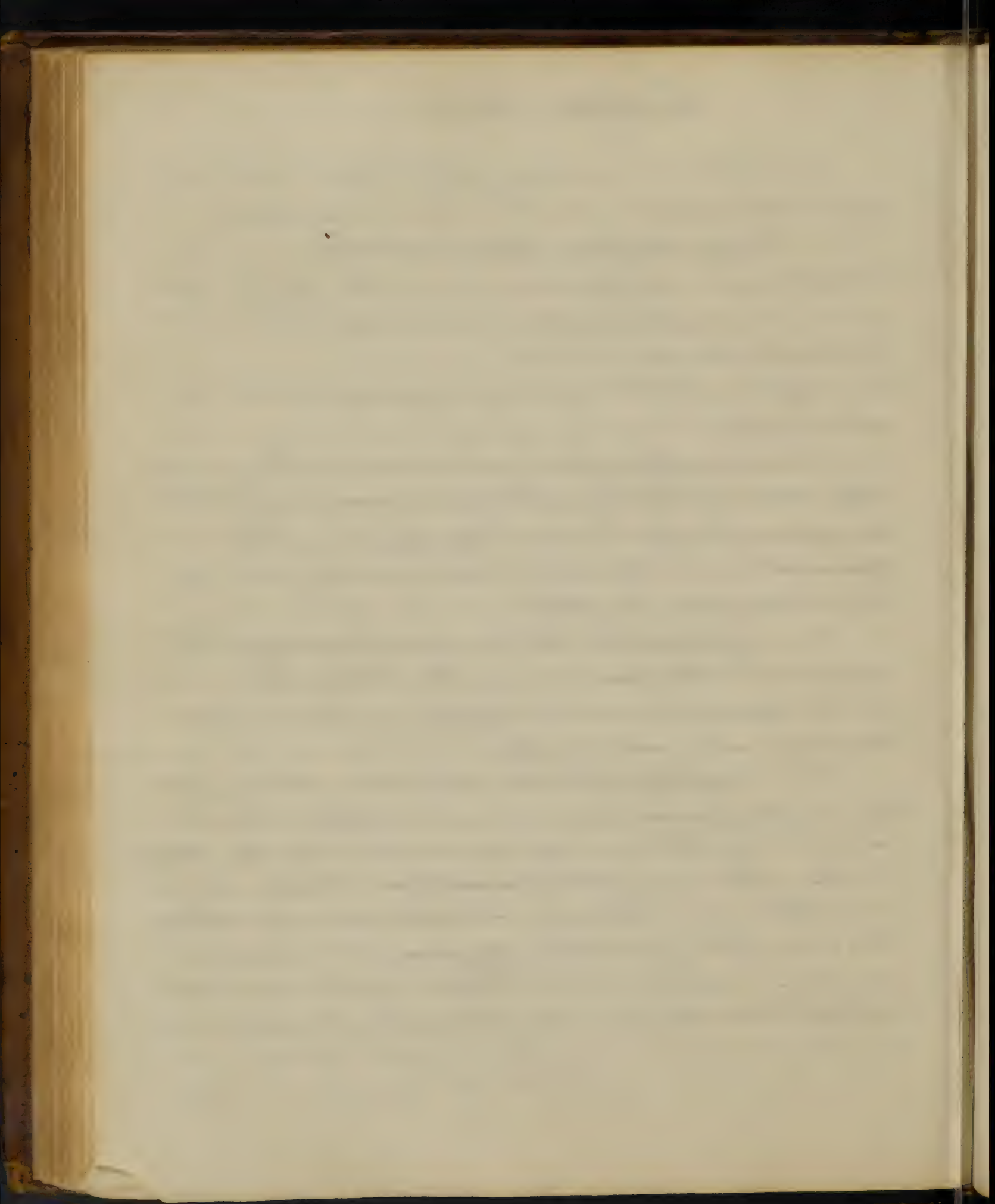
"By a divorce a vinculo in Eng. issue are bastardized, & marriage made void ab initio."

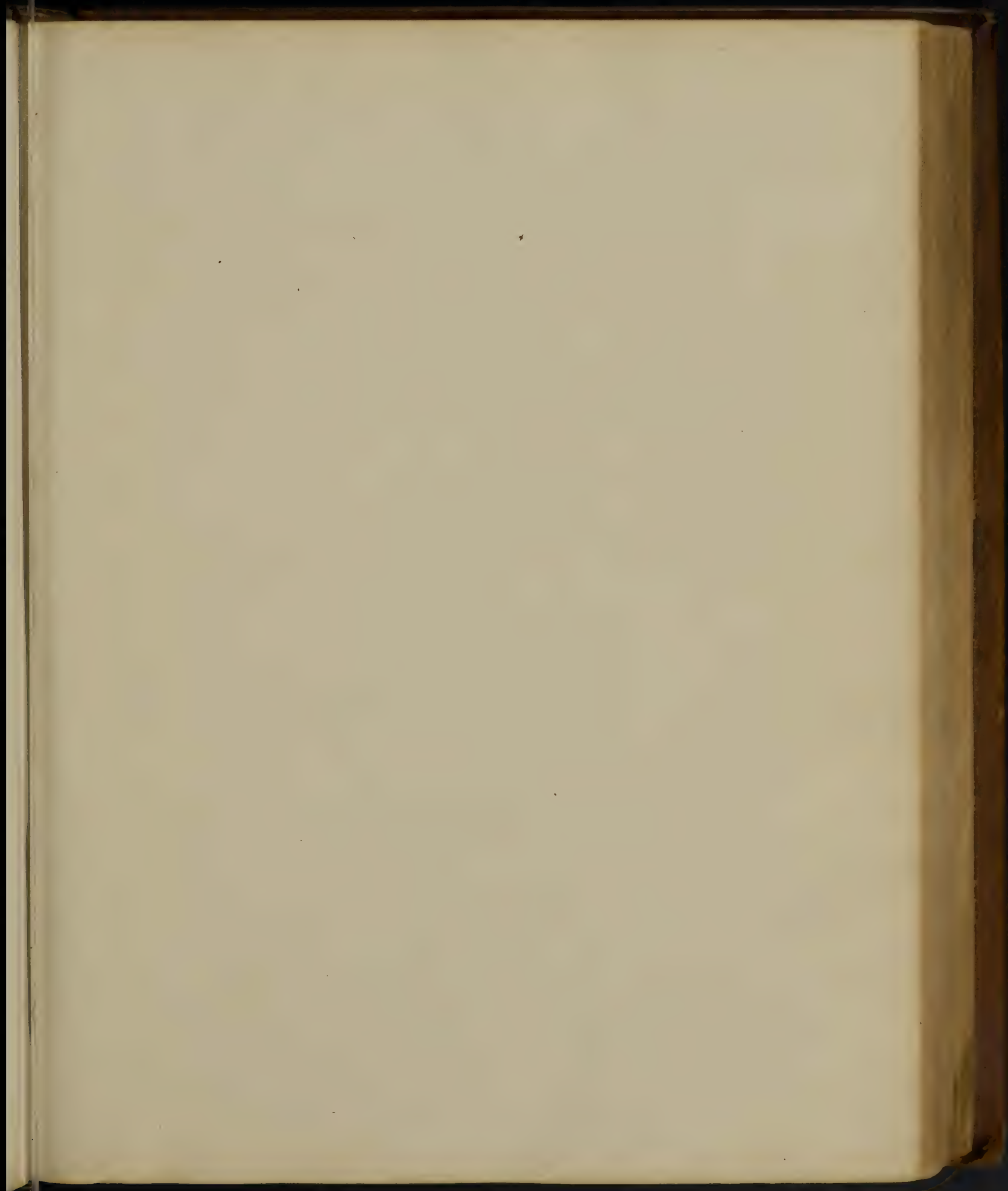
"If the lawfulness of the marriage be not called in question during their joint lives, it cannot be afterwards, the children may inherit, the wife have dower the hus. curtesy. Note 860."

Law in Conn. as to a partial divorce, the same I suppose as in Eng.

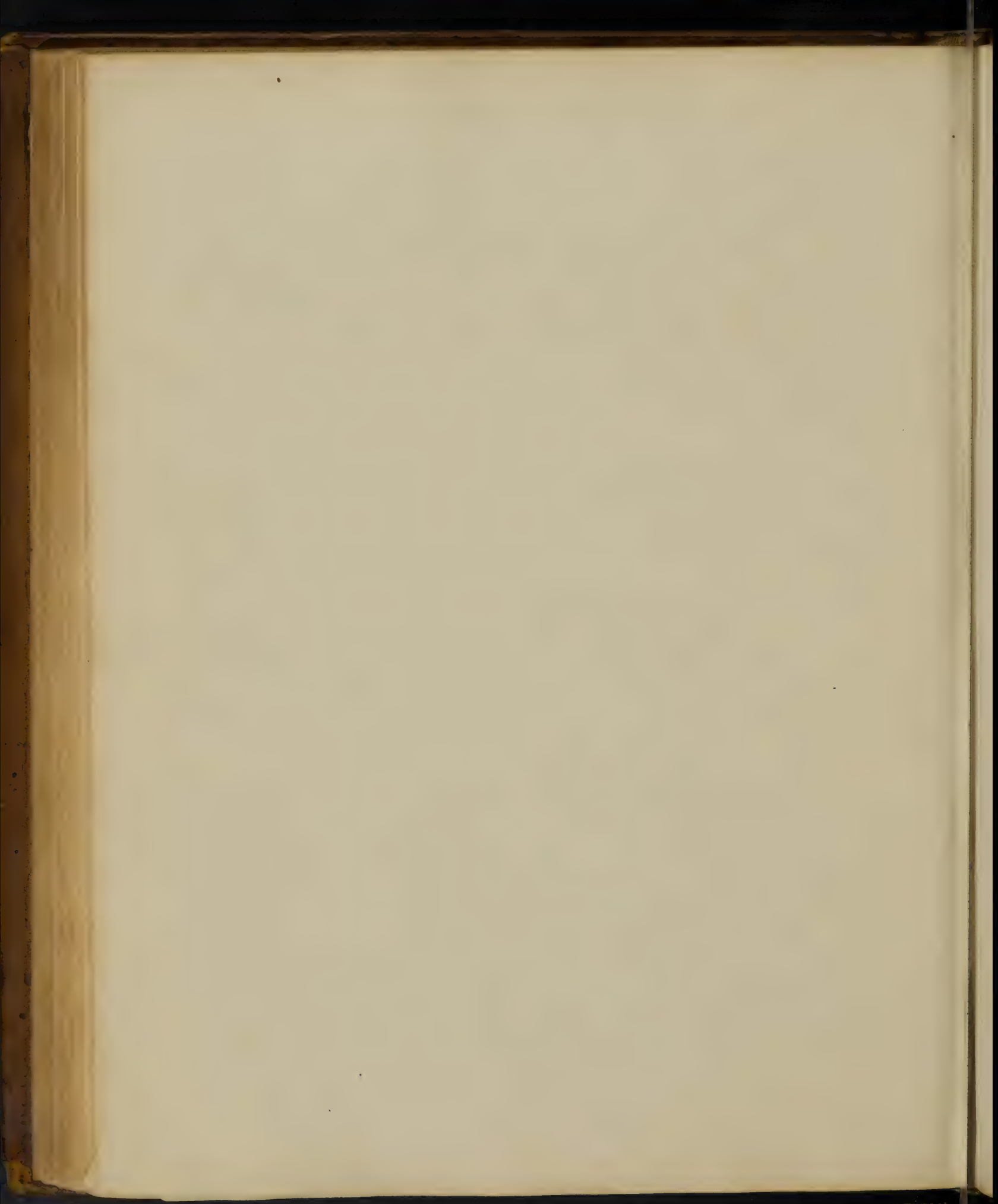
But in case of total divorce in Conn. for adultery the wife has dower, if she is not the faulty party - also alimony, not exceeding one third of husband's Estate may be immediately assigned her. Also personal property may be granted her.

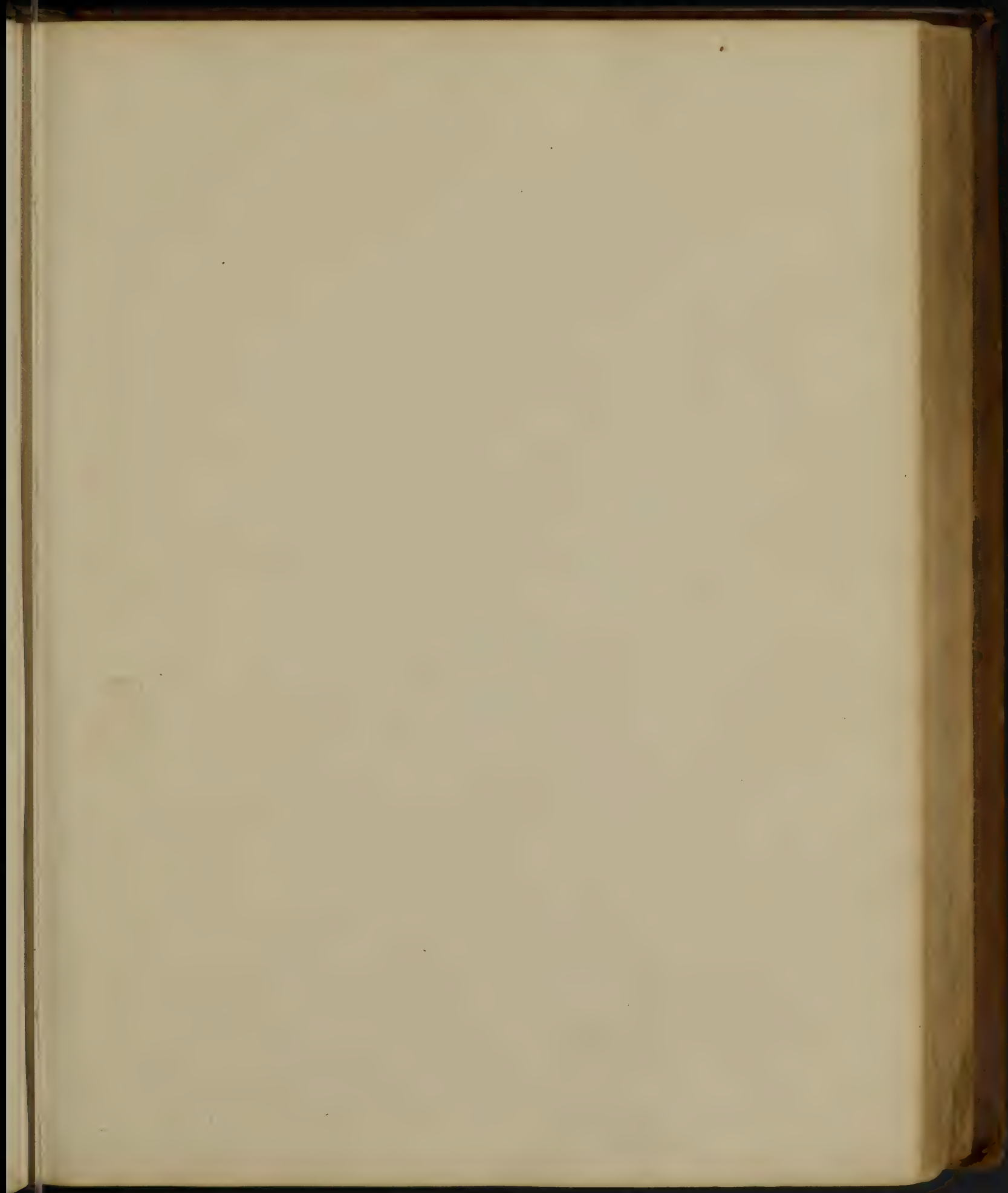




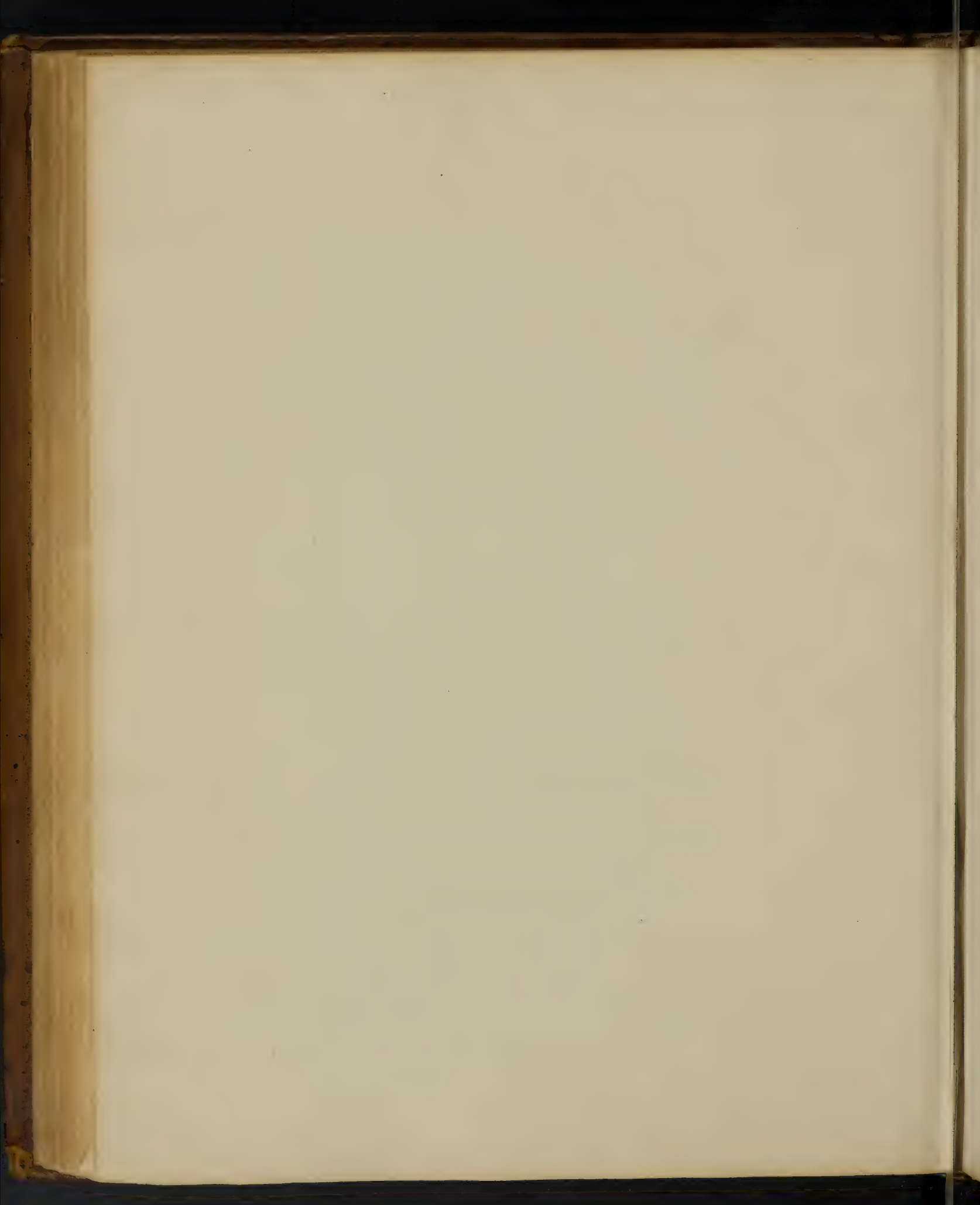


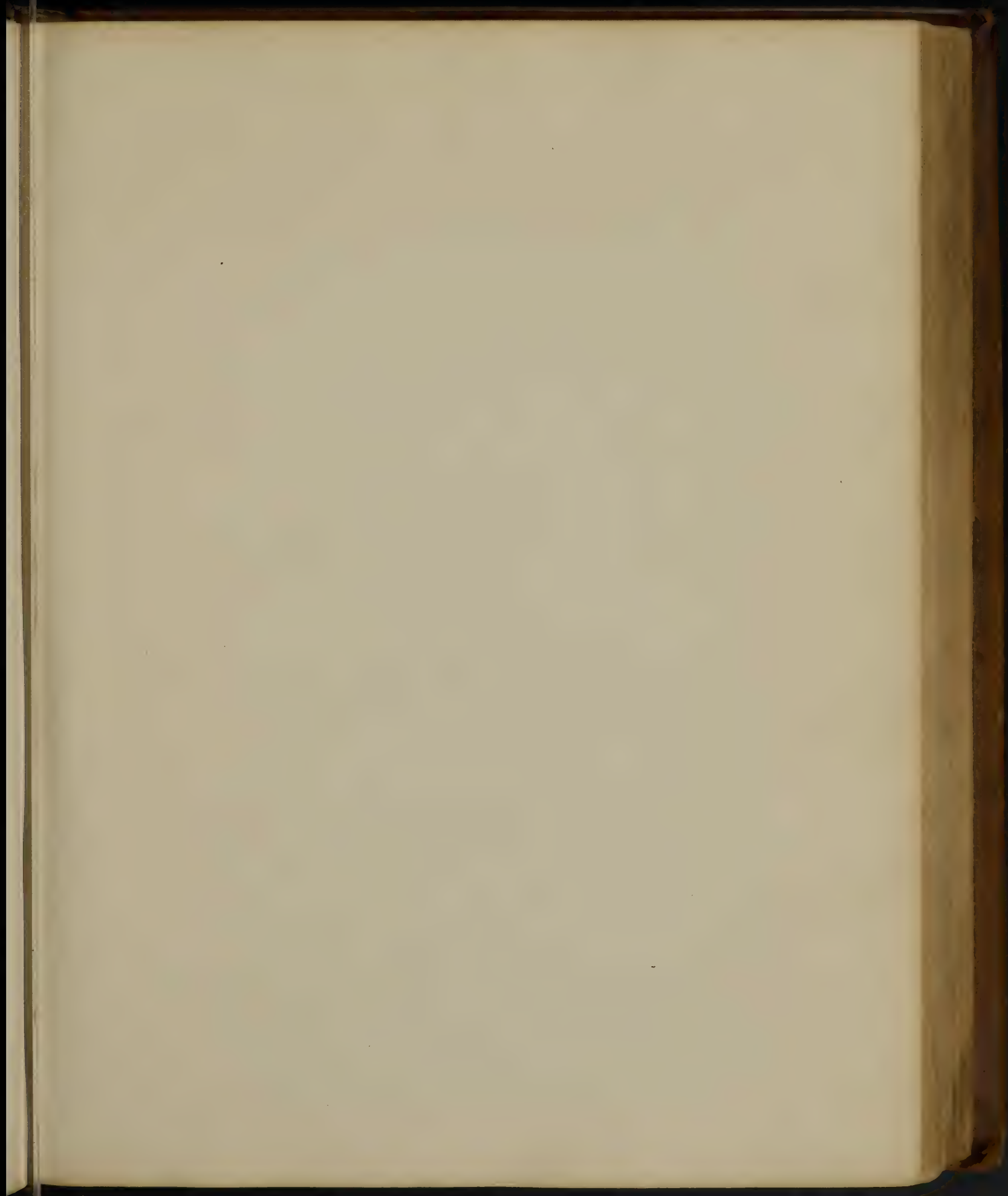




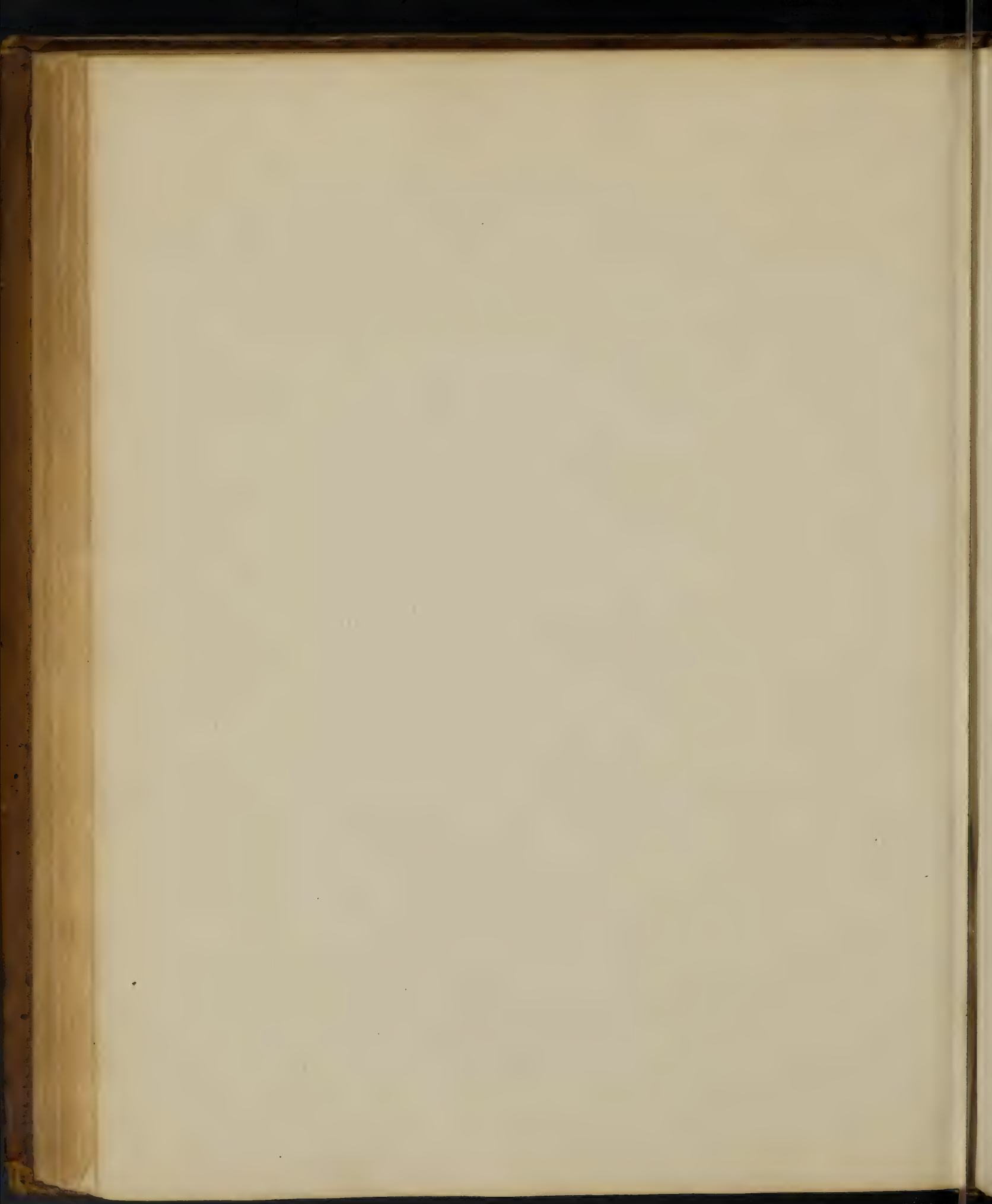


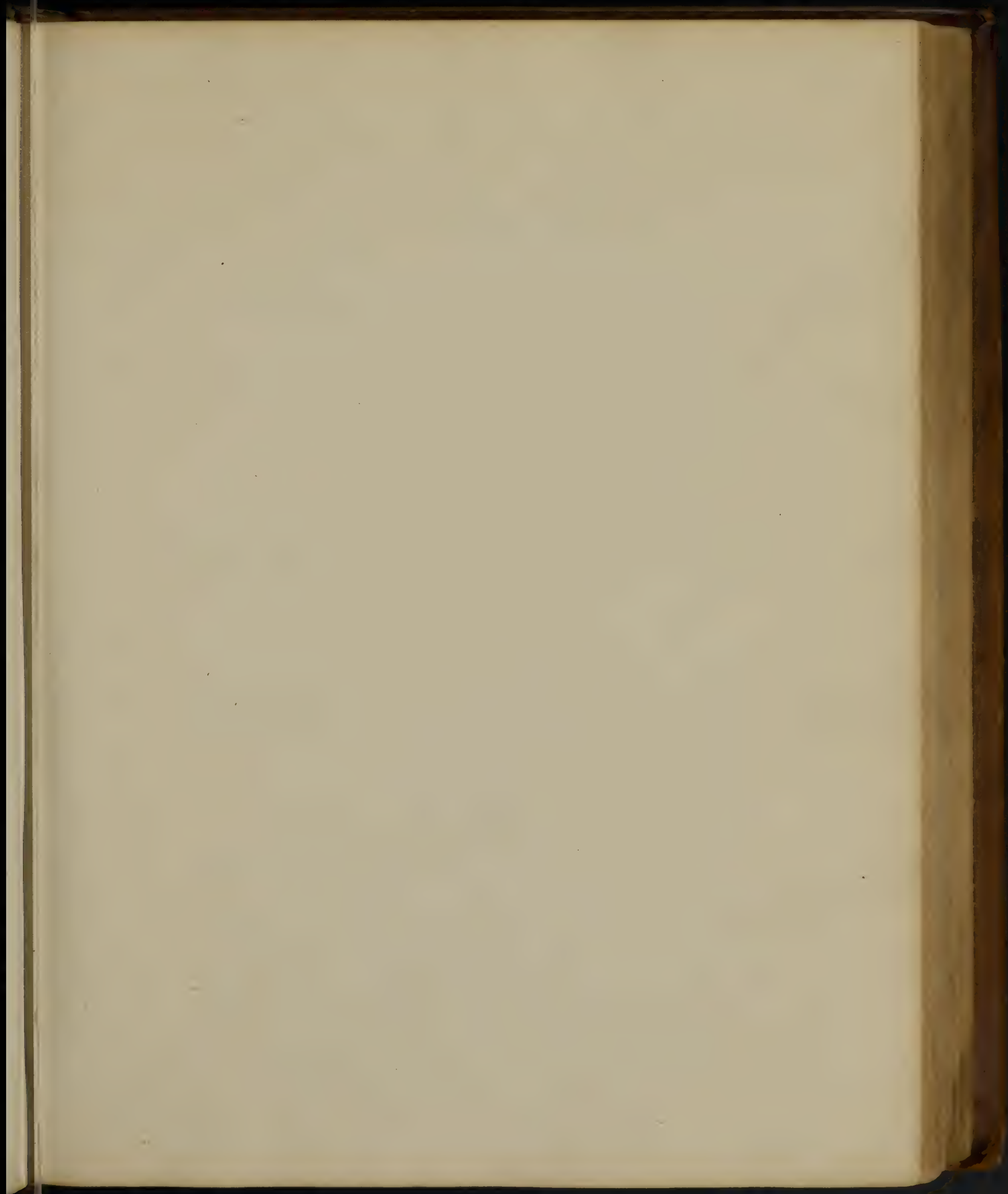




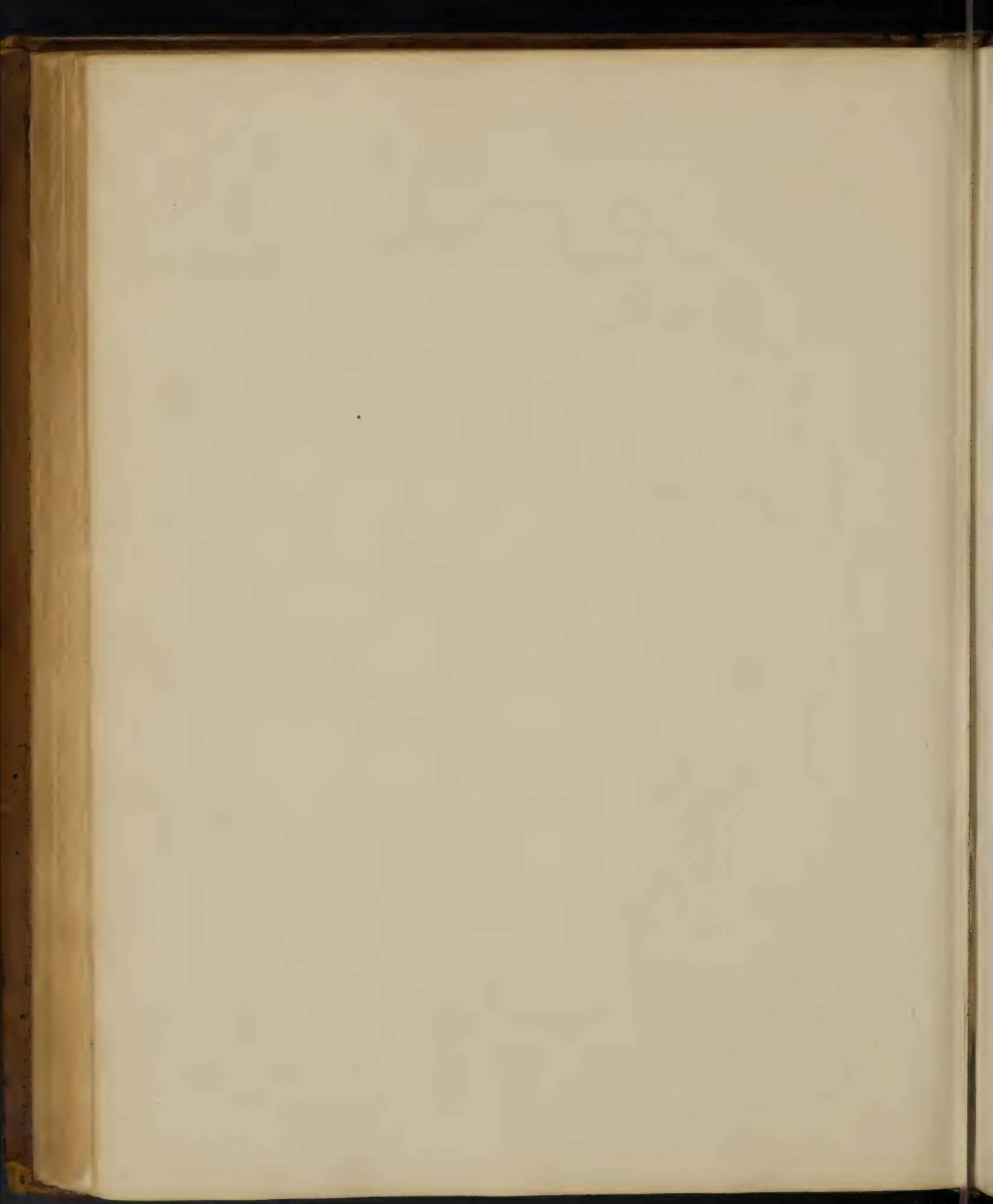


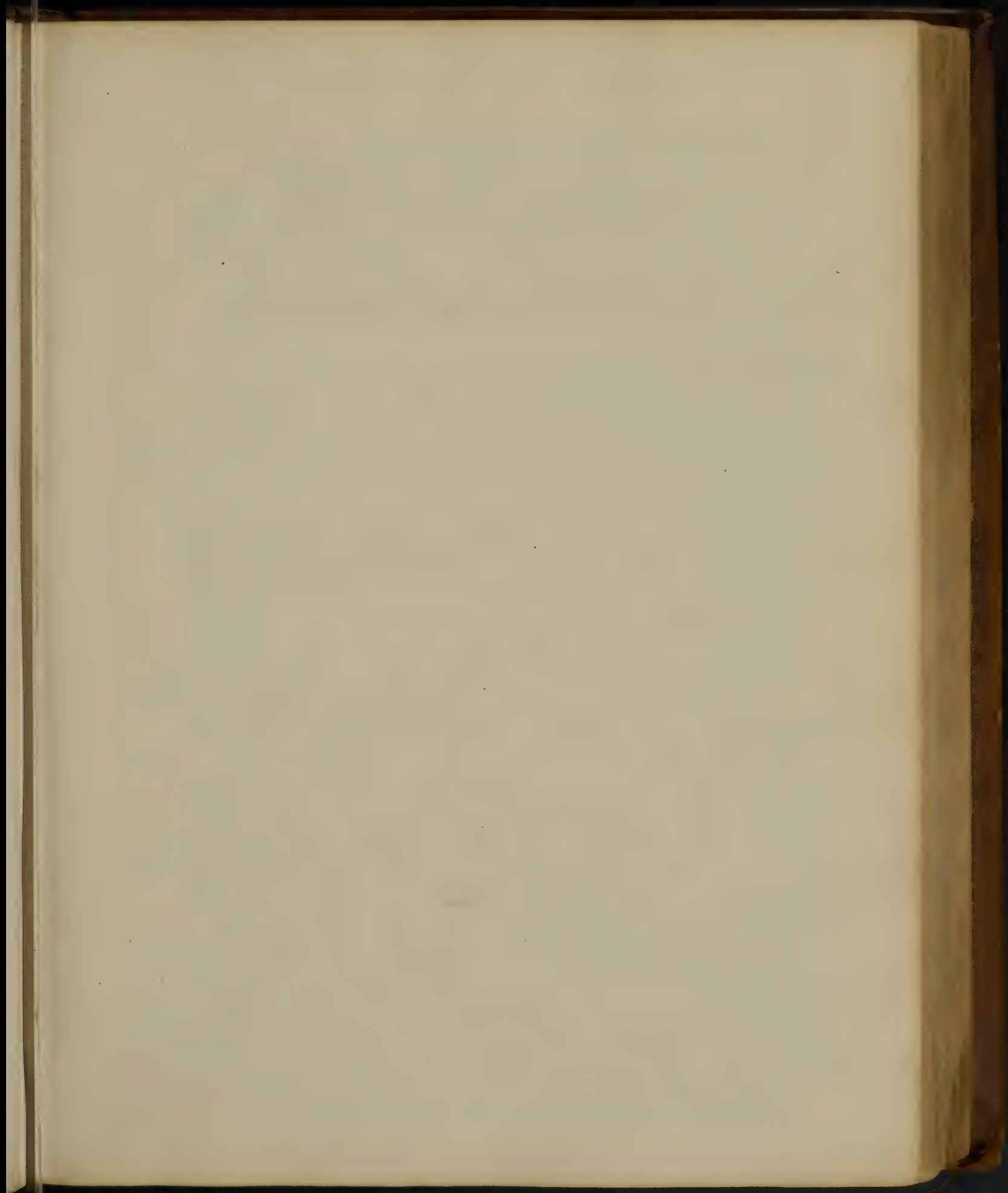




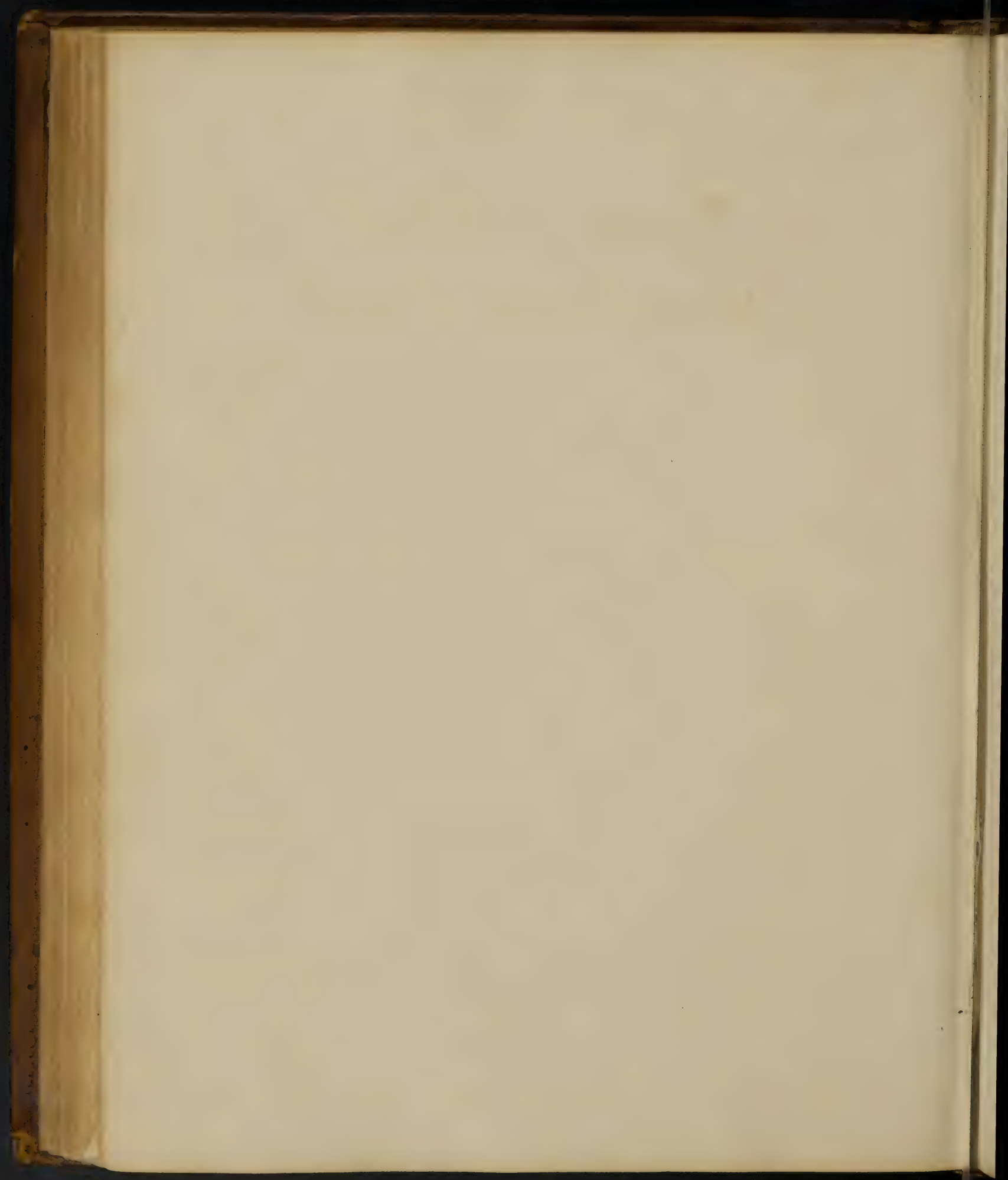












# Of Parent and Child, Guardian and Ward.

By Mr Gould.

An Infant or Minor is one, under the age of 21. whether male or female. The period of full age is not the same in all countries. In the civil law, as to matters of contract, it is 25 years. 1 Bl. 463. Litt. 104. 259. 3 Bac. 118.

## Privileges & disabilities of Infants.

1. As to their crimes. No person under 7 years of age can be punished for any offence. There is till then a want of will & capacity of discrimination between right & wrong. 4 Bl. 203. -

At 14, a person is punishable even capitally. Between 7 and 14, an infant is punishable if doli capax - otherwise not. The maxim of law in this case is, "malitia supplet aetatem". 1 Bl. 464. 1 Hale 25. 1 Hawk. 1. 160. 247. 1 Hale 20. 26. 434. Forst. C. 2. 70. 72. 1 Bl. 464. 4 H. 22. 3. 1 Bac. 130.

It is said in the Books, that between 7 & 10½ the presumption is for the infant, & the prosecutor must prove him to be doli capax - from 10½ to 14 the presumption is as the infant & throws the burden of proof on him. But this distinction is not supported, & I think it clear that the presumption is in favor of the inf. until 14; otherwise the rule given w<sup>d</sup> be negatory. 4 Bl. 23. 1 H. 464. 1 Hawk. 1. 1 Hale 25. 27.



## Parent and Child.

It is also said, "in some cases infants above 14, are privileged as to misdemeanors & offences, not capital". But no cases are instanced except those of omissions. (The clergy is not privileged in case of riot, breach of the peace, &c.) as for not repairing a bridge, &c. I suppose because the infant has not the command of his property & person, & is therefore supposed not to have the means of performing the acts omitted. 3 Bos 180. 4 Bl. 22. 1 Hale 20. 2.

An infant is not permitted to be convicted on his own confession without great caution on the ground of his want of discretion. The judges are to be his Counselors. Justice Foster in a case of this kind, directed the clerk to enter a plea of "not guilty," where the infant persisted in a plea of "guilty" on a charge of felony. (Now on a charge for a misdemeanor.) Cro J. 466. Forst 70.

The presumption in favor of an infant under 7 can not be rebutted; it is *presumptio juris de jure*. Clow. 19. 1 Hale 20. 23. Forst. 439. Comf 222. 3. 1 Bl. 464.

There is one instance of a pardon for homicide to an infant under 7. But does not prove a previous conviction. The pardon may have been before trial. 4 Bl. 337.

A general Stat inflicting corporal punishment. Sometimes extends to infants, the not expressly named. Sometimes not. The Books leave this point obscure, & after much examination, I find it difficult to lay down a definite rule. I take the rule to be, If the offence created by Stat. is made such as is corporally punished at C. D. infants are within it, the not named. e.g. If the

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the Stat. makes an act to be felony & punishable with death, - But if the Stat. prohibits an act, not constituting such an offence as is corporally punished at C.D. the infant is not punishable, unless named. E.g. The Stat. of forcible entry & detainer. Here the corporally punish. is called collateral to the offence, is supposed, not incident at C.D. to the act prohibited, or the offence created. In these cases the C.D. punish. may be inflicted. Co.L. 247. 387. 3 Bac. 131. 1 Hal. 212. Pleas. 364. Cro. J. 274. 1 Hawk. l. 19 viii. 201.

II. As to Torts. There has been a general error in the belief of the profession, that infants were not punishable for Torts until 14, as in crimes; whereas they are generally liable civiliter, at any age - i.e. for Torts committed with force. The will or intent is never regarded, to make him responsible to the party injured. As in Treason founded on conversion, which always supposes a positive misfeasance. The damages are not a punishment but mere indemnity. There is an ancient case where a battery was maintained by an infant of 4 years, for scratching out a man's eye. 1. Forbl. 81. q. viii. 395. 1 Hawk. 3. 2 Vol. 547.

An infant however is not liable at any age for all torts. One of 17 has been adjudged liable in Slander. (Moyes says not before that age, but I think this no authority.) Hence it is said that infants are not liable in this action, before that age - but this is a non sequitur. Qu. if doli capax - sooner. He is not liable in



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in this action, I conclude, till he is capable of malice, for that is of the gist of the action. One of 4 years is not then liable; but is not one at 14, & as the case may be, be-  
'one, as in crimes? 40y 129. 3 Bac 132. 3 Day

The liability to be punished as a common cheat, it has been said, he is not liable in a civil action for fraud or deceit. Indeed it has been held that he is liable civil-  
iter for such torts only, as suppose a kind of "violence, or force," - as trespass, trover, &c. 3 Bac 132. 1 Toot 179. 272. 1 Sid. 129. 258. 1 Lev. 169. 1 Hbl. 778. 405. 913. 4. 1 Honbl. 71.

This doctrine is disapproved by S<sup>r</sup>. Mansfield & Kenyon. The former held the privilege of an infant sh<sup>d</sup> be a shield, and not a sword. These two great names must at least render the proposition questiona-  
ble. I think it not law. And S<sup>r</sup>. K. held obiter, that he would be liable even in indeb. ass<sup>t</sup>. arising ex-  
delicts. As for embazzling, p<sup>er</sup> s<sup>on</sup>'s money. 3 Bur. 1802.  
Peak 223.

However an action sounding in tort cannot be sus-  
tained vs an infant when the cause of action arises ex  
contractu. Because if he could be rendered liable by  
varying the form of action, his privilege w<sup>d</sup> be merely  
negatious. as e. g. a horse is bailed to an infant, who  
abuses him. There the ground of action is contract. The  
wrong is a breach of contract. In the former case it is  
a fraud in obtaining the contract. 8 T<sup>o</sup> 335.

And it was held by Parker & Trevor, that if a person  
would

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would take upon himself to trade & act, as if of age; no evidence of his infancy ought to be admitted, because if admitted, he would avail himself of his own fraud. But this is not Law. If it were his contracts w<sup>d</sup> bind him in such cases, & he might remove the disability imposed by law. 12 Vin. 203.

In some cases however, Chy will decree even a contract to be good as an infant, on the ground of fraud. i.e. to prevent the effect of his fraud. No precise rule is laid down as to the particular class of cases in which Chy will thus interfere. 3 Bac. 140. 13 Vin. 536. 1 Fort. 70. 1. 9. Mod. 38. 2 Eq. Ca. at. 489. 1 Br. Ct. 353. 358. - That an infant is no more liable for fraud in Equity than at Law. - see, 1 Root 272. 179.

But Chy. cannot enforce a contract as an infant. which is (not merely voidable, but) absolutely void. This w<sup>d</sup> be to make a contract for him. But another reason is, "no consideration is moving to the adult, so that even he is not bound. (page.) 1 Fort. 71. 176. 1 Bl. 75.

Miscellaneous particulars. In Eng. the age for choosing guardians, in both males & females, is 14. In Com. 14 and 12. 1 Bl. 463. St. C. 24.

An Infant may be executor at any age even in ventre sa mere - but he cannot act as Ex<sup>r</sup> till 17. In the mean time, an adm<sup>r</sup> durante minoritate s<sup>d</sup> must be appointed. 1 Com. 235. 5 Co. 29. Wintw Off. 4. 307. 3 Bac 121. 1 Root. 250. Earth 466. 7. Sal. 37. 2. May. 338.

No one can be an adm<sup>r</sup> till 21. - for an adm<sup>r</sup>.



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must give bondg. an Exec. in Eng. need not. 3 Bac. 121. 560.  
27. 5. 118. 395. Comb. 475. 6. 11. 446. 7.

In Conn. also one may act as Exec. it is said at  
17. by Stat. for he may make a will. H. C. 42. Lord. 155.

By another Stat. every Exec. must give bonds. Du.  
then, whether he can act till 21. as adm. cannot. in  
Eng. I think he cannot. H. C. 268. 3 Bac. 121. 6. 11. 446. 477.  
L. Ray. 338. Comb. 475. 6. 11. 39.

Age of consent to marriage is 14 in males & 12 in fe-  
males. But if one party is of the age of consent & the  
other not. the former may dissent afterwards, as well  
as the latter. 1 Bl. 436. 463. Co. L. 79. 5. 11. 437.

But a female may be betrothed at 7. & if above 9  
(according to some, if 9.) at husband's death, is entitled  
to dower. 5. 11. 36. 2 Bl. 131. 1 H. 463.

Age for disposing of personal property by will  
in Eng. is, according to some opinions, 14 in males &  
12 in females, if proved to be of sufficient discretion -  
according to others, 15, 17, 18. The former seems to be  
the better opinion - for it agrees with the rule of the  
ecclesiastical law, which in Eng. governs in such cases.  
Co. L. 89. 2 Vern. 104. 469. 2 Atk. 318. 2 H. 316. 1 Bl. 463. 2 H. 497.

By our Stat. the age for devising pers. prop. is 17.  
in both sexes.

Full age is completed on the day preceding the  
21<sup>st</sup> anniversary of one's birth, & there is no fraction of a  
day; consequently one may be of full age when not  
21 by little less than 48 hours. 2 Bl. 525. 1 Bl. 463. 2 H. 480. 1026.  
1 H. 144. 686. 1 Bl. 142. 167. 1 H. 589.  
Ray. 84.

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III. Also Contracts. In general no person, under the age of 21, can bind himself by contract. his contracts are void or voidable. Distinction hereafter. 1 B.C. 465.

If an infant & a adult join in a contract the latter is bound. So if they join in a penal bond. 1 Root. 58. Gang 500. 8 Mod 190.

If an adult contracts with an infant, former bound, latter not. The privilege of infancy is personal, & will not extend to a co-contracting party. 2 Stra. 937. 2 Sid. 109. Cro C. 562. 1 Bos. C. 38. 1 Mod 25. 3 Bac. 140. 1. 3 Mod. 248. 1 Show. 171. 1 Sid 41. 445. 1 Vent. 51. 1 Root. 58.

So in contracts to marry. The rule is however different when either party is under the age of consent, as before observed. Stra. 937. 3 Bac. 141.

The same rule is observed in Equity. a specific performance will be decreed as the adult, when he could not have obtained one as the infant. - Chancery however will do it in such manner as not to deprive the adult of his part of the contract. 1 Bos. C. 39. 40. 9 Vin. 390.

The adult being bound when the infant is not, is not inconsistent with the rule, that in contracts both must be bound or neither. This only means that by the terms of the contract both must be bound, &c. as if A. by the terms, be bound to B. but it is optional with B. to be bound to A. - neither is bound, for there can be no consideration for A's promises.

But the rule, that the adult is bound when the infant is not, does not hold if the contract goods be



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the infant is absolutely void. Because it is legal non-entitled, & no consideration is moving to the adult. e.g. a promise in consideration of a power of attorney by the infant. Stran. 233. 1 Pow. C. 37.

And if the infant has rec<sup>d</sup> the consideration afterwards accepts the contract, he is not bound to refuse or restore it. It is considered a gift. (Query, the contract being disaffirmed, would not, trover lie, after demand. or indeb. ass<sup>t</sup>. implied ex delicto. as in Conn. where an infant bought horses, tho there was an original paid.) Peck. 223.

It is impossible to abrogate this rule without destroying the privilege of infancy. The rule is disapproved of by many, but it is necessary & settled. The infant is allowed this privilege, on a supposed indiscretion. There are supposable cases, in which a recovery to the infant w<sup>d</sup> do him no injury, & leave him in statu quo. - as where he purchased an horse, recovered back the money, & still detained the horse. Litigues might certainly lie without injuring the infants privilege. But the rule of Law must be general. Yet might not Equ<sup>y</sup>. sometimes interfere?

But for necessities an infant may bind himself by contract. These are food, apparel, lodging, medicine & instruction, as in valuable trade. 1 Pow. C. 34. 5. 1 Bl. 466. Co. L. 172. 1 Mol. 729. Cro. J. 494. 3 Com. 163. 1 Sid. 112. 8 Q. R. 573.

But the things contracted about, must be necessary for the infant at the time of contracting, which is a

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Question for the jury to determine, the articles being of the description of necessaries (above). - Cro. 583. Cro. 560. Pop. 151. Palm. 361. 1 Esp. 162. Str. 1101. 8 T. R. 578. 3 Bac 132. 3. 1 Forb. 68. 4 Bac. 17. Carth. 110.

Therefore a replication by the p. of furnishing necessaries, generally, is good. he need not set them forth on the record specifically, as if the Ct. were to determine them. 4 Bac. 17. Carth. 110. 11.

So an infant may bind himself for his wife's necessaries - also for his children's. 3 Bac 133. 4. Esp. 161. Str. 168.

So, bound for his wife's debts, contracted before coverture, by which she herself was bound, for he takes her cum onere. Barnes, n. 95.

But he can not bind himself even for necessaries, if under the care of a parent, guardian or master, & duly provided for - for he has the privilege of contracting only that he may not suffer. 2 B. & C. 1325. Peake 229. 2 Atk. 35.

Hence he can bind himself even for necessaries only in three cases - 1. If he has no parent, &c. - 2. If out of the reach of their care. - 3. If being under the care of a parent &c. he is not duly provided for.

But in the two last cases, the infant's parent, &c. is also liable - for parents are bound to maintain their children - & the infant's power of contracting in these cases, is intended not to discharge the parent, but to relieve himself. 1 B. & C. 446. &c.

Does our Stat. vary the rule, as to the infant's power to bind himself for necessaries? Do not both Ct. adopt the



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idea, that the infant, if he has no guardian is bound by contracts for necessaries? Is he to starve because he is under the care of a parent &c? *St. C. 293. Et master & child. 251. 287.*

As to the infants power to bind his parent &c the Stat. does introduce a new rule, viz. That if the parent &c allows him to contract for himself, the parent &c is bound. *St. C. 293. Child. 287.*

In strictness the infant is not bound even for necessaries by his express contract - for he is not of course liable (as is an adult) to the extent of his agreement - but only to the amount of the true value of the necessaries. This obligation then seems to be founded on a contract implied. *3 Bac. 133. 4. Cro E. 583. Latch 169. Cro J. 560. Esp. 151. 1 Rol 729.*

Mode, in which an Infant may bind himself for necessaries.

1. By a penal bond he cannot. *Cro E. 920. 1 Pow C. 54. 679. 1 Rol. 729. Esp. 164.*

2. By a single bill - i.e. an obligation without a penalty, he may. *Chitty 20. Cro E. 920. 1 Pow C. 35. Str. 939. Lev. 36. 3 Bac. 134. 1 Keb. 382. 416. 432.*

3. By a negotiable note, when actually negotiated, he is not bound. *1 T. R. 41. 1 Fomb. 73.*

4. By a note not negotiable - or not negotiated, he is bound. *1 Wood. 403. Carth. 160. 1 Fomb. 73. Chit. 20. 1 Pow C. 34. 5.*

5. By a bill of Exchange not negotiated, he is bound - (not if negotiated) *Carth. 160. 1 Fomb. 73. Chit. 20. 8.*

6. By an account stated he is not bound, though the

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items of the account may state it to be for necessaries. —  
3 Bac. 134. Co L. 172. Latch 169. 1 D.R. 40. May 87.

Reason of these distinctions. — 1<sup>st</sup> The reason an infant is not bound by a penal bond, is said to be, that the penalty is to his disadvantage. 3 Bac. 134. Co Lit. 172<sup>a</sup>. Cro E. 920. 1 Foub. 73. 3 Bur. 1806.

But the true reason seems to be, that the consideration is not examinable. If therefore the infant were bound at all by it, he might be liable for things not necessary. 1 Pou. C. 36. Chit. 20. 1.

And the true principle of discrimination in all the above cases seems to be this. If the consideration is examinable, he is bound. the contract being for necessities. But seems if the nature of the contract, or security, includes an enquiry into the consideration.

2<sup>d</sup> As to the single bill. — the consideration was formerly examinable. Is it now in the case of infancy? In the case in Kibble, per prolied "necessaries" — Et hinc that D. might traverse the replication. 1 Kib. 382. 416. 423. 1 Pol. 729. 1 Bur. 86. Chit. 20. 1 D.R. 41.

In common cases however, the consid<sup>n</sup> is not examinable.

3<sup>d</sup> and 4<sup>th</sup> As to negotiable note, negotiated. Note not negotiable. or if negotiable, not negotiated. — The consid<sup>n</sup> is examinable in the two last cases. not in the first (except as to its fraud &c.) according to the leading principle, therefore he is bound in the 2 last cases. Ryd. 156. Doug 614. 1 Foub. 73. 1 Pow. C. 34. 5. 341. 1 Wood. 403. Chit. 9. 87. 81. 82. 1 D.R. 445. 3 Black. 70. Park 61. 216. Esp. R. 117. 262. Stra. 674. Day 2 D.R. 71. Chit. 20. 1.



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5<sup>th</sup> A bill of Ex. not negotiated, seems to stand on the same ground as a negotiable note, not negotiated. *Idem*.

6<sup>th</sup> Account stated. "When the rule was settled, the items of an account stated, were not examinable. This doctrine is now relaxed, it seems, but the rule continues. The reason given by Powell is, "The only consid<sup>n</sup> is the stating of the account". (unsatisfactory.) *Latch. 169. 3 Bac. 126. n. 134. Moy 87. Cro. J. 602. Pow. 36. 1 Hon. L. 70. 1 W. R. 40. v. Pow. C. 36.*

But in case of a final bond for necessaries. Is the infant liable on the original simple contract? It depends on this question: does the bond merge the simple contract? It seems not, if the bond is void *post*. For the doctrine of merger is founded on the idea that the lower obligation or remedy is swallowed up by the higher. But a void bond creates no obligation or remedy. (void & voidable, *East*, *Willmott v. Barber* 3 Bar. 1078. *esp* 90. *Strat* 1249. *2. 3 Bar. 3. 2 Bay 360.*

By way of analogy. Cite one or two cases to show that he is bound when the security is void.

In *Gray vs Fowler*, a contract originally good not affected by an usurious obligation. *Esp. Di. 175. 6. 1 Pow. C. 208. 216. 176. 3 C. 462. Bull 182. 60 L. 172. a. n. 3 Bac. 134.*

But a single bill does merge the original contract, for it binds the infant, it for necessaries, & if not, it is only voidable. The obligee cannot abandon the single bill, & sue on the simple contract. *Esp* 164. *(Full. & C. 115. Pow. C. 218.)*

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An infant may bind himself for necessaries by a note of hand, tho' a Specialty here, & the consid.<sup>n</sup> is examinable. A note by an infant, not for necessaries, was only voidable. The decisions have gone round the compass. In 1809. decided (in Judge Swift.) in Ct. of Errors to be void. 1 Root 58.

For money lent, an infant is never bound, unless it is actually laid out in purchasing necessaries. At law, he is not bound, unless the lender himself lays it out, even tho' the infant sh.<sup>d</sup> do it - for the contract is good or not, at the time of lending, & not made so by matter ex post facto. If the lender lays it out, he recovers the value of the necessaries, & no more. 3 Bac. 134. Sal. 279. 386. 10 Mod. 67. 1 Pow. C. 37. 5 Mod. 368.

But in Equity, infant is bound, if it is laid out in necessaries even by himself. The lender is in place of vendor, & recovers the value of the necessaries, if not more than the sum lent, but not more than the value. 1 P. W. 558. 583. 2 Eq. Ca. ab. 516. 1 Pow. C. 37.

Infant is not bound by a contract, for articles to maintain his trade, for they are not necessaries. 1 Pow. 36. Cro. J. 494. 1 Bac. 133. Sal. 279. 1 Rol. 729. Stra. 1083.

So an infant is not bound by a contract to pay for repairing his buildings. 1 Pow. C. 33. 3 Salk. 196.

But it has been held that if he takes a lease of a house, & resides in it till the rent day (the rent not being above the value) he is liable for y. rent



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in an action of debt. So of land. The Ct. might say it was on the same principle that he must pay for lodging but it cannot be. This rule is so opposed to the ordinary ones of the title that I think it very questionable. 1 Pou. 30. Cro. J. 320. 2 Bulst. 69.

He is not bound by contract to pay for instruction in singing, and dancing. I think it might come in the terms of necessary education, if only suitable to his rank. D. Mansfield has remarked in cases of this sort, that the law must change with times & manners. 1 Pou. 3. 36. 1 Sid. 446.

But the regularly bound at law only by contracts for necessities, if an infant does voluntarily what he is compellable to do, either at law or in equity, he is bound by the act, unless advantage was taken of him. e. g. If he makes an equal partition, when joint tenant - pays rent on a lease to his deceased father - assigns a dower, when heir at law. So if a mortgage descends from the deceased mortgagor to his infant son, who reconveys on payment of the debt. 1 Pou. c. 36. 2 Jac. 684. 3 Bar. 1801. 2. Co. L. 172. a. 315 a. 1 Font. 77. q Co. 85. 1 Bl. C. 575. 3 Bar. 1799. 4 Brissot 15.

This is the only class of cases, in which an Infant is bound at law except for necessities. (or even here he is at first compellable in equity only.)

Infant debt is bound by a decree in Chy. except that he is allowed 5 months after full age to impeach it,

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it, for fraud or error. (called in Law, his day.) 2 Burr 342, 424.  
2 Vent. 351. 12 Wm 295. 9 Mod 128. 2 P.W. 401. 3 H. 352. 3 Atk 626. 2 H. 531. 1 Font.  
75. 76. 1 P.W. 504.

Infant p<sup>l</sup>ff. is as much bound by a decree in Ch'y. as an adult, unless fraud or gross neglect appear in his prochein amy, (or, I suppose, Guardian also). He is not allowed his day when p<sup>l</sup>ff. 3. Atk 626. 1 Font. 75.

Such acts of an Infant as do not affect his own interest, but take effect from an authority that he has a right to exercise, are binding - e.g. Infant Ex'or. duly pays, or receives debts - or duly discharges them - executes an office, that he may hold. 3 Burr. 1802.

A promise after full age, will bind the promisor to a contract made before, tho it was not for necessities. But this rule does not hold where the original contract was void - only where it was voidable. 2 T.R. 766. 1 Stra. 690. 2 Vent 263. 3 Bac. 134. 145. 1 Font. 131. 2. Co L. 295. 1 T.R. 648. Chit. 21. Esp. 163.

And tho he should have given while an Infant a written security, which is absolutely void, a promise after full age will bind him. the original parol contract being a sufficient consid<sup>n</sup> to support the subsequent promise. Esp. 164. Bull. 155. 3 Bac. 134.

This rule is otherwise, if the written security was only voidable - for then the parol contract being merged, does not remain a consid<sup>n</sup> for a parol promise - but such security would probably be



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affirmed by the subsequent promise. The action must be brought on the writing, I suppose, & the new promise replied to a plea of infancy. Esp. 164. Bull. 155. Root 58.

But when a person, after full age makes a new promise in consideration of a contract made during infancy, he is bound no farther than the new promise extends. e.g. New promise to pay 50 p. Ct. of the debt; & in three years, when originally in one year. Esp. 164.

To a plea of infancy, the replication of a promise after full age, is supported as far as the plaintiff is bound to prove it, by proof of a second promise, namely. If defendant was then an infant, he must prove it. 10 T. R. 648. Esp. 164. 3 Bac. 132. n.

Decided by our Ct. of Errors, that an action on a note given by an infant is not supported by proof of a new promise, & that the action sh<sup>d</sup>. be on the new promise. Did the Ct. consider the note void? Decided by Ct. of Errors 1809 that an infants grant is void under our Stat. 1 Root 58. 109. Bull. 155. Esp. 164.

If an adult jointly interested with an infant in a lease, obtains a renewal of it, in his own name only, he shall be deemed to have acted as trustee, & the infant may claim his share of it, if it proves beneficial. otherwise not. - 1 B. & C. 376.

If an infant is sued & arrested on a cause of action, to which his infancy is a good defence, he is not discharged on motion; or like a feme covert, on common bail, but must plead his privilege. 1 B. & C. 480.

What

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## What cont<sup>s</sup> made by Inf<sup>s</sup> are void & what voidable.

Contracts of Infants not for necessities, are generally void or voidable, (ut ante.)

Courts lately are inclined to construe contracts of infants as voidable only. This construction is generally advantageous to the infant, as it allows him an election when he attains full age. & the other party cannot take advantage of it. 3 Bac 132. n. Str. 938. 1 Burr 566. 3 Burr. 1805.

It is laid down as a general rule under this head, that those contracts, in which there is an apparent benefit, or semblance of benefit to the infant are voidable only. otherwise, as to those in which there is no apparent benefit &c. they are void. The last part of this rule is questionable. 4 Cruise 3 Bac. 136. 145. Cro. E. 502. 3 Mod. 310. 1 Pow. C. 33. 38 54. Moor 105. 1 Rol. 730. 2 H. Bl. 511.

Hence his purchases are voidable only - supposed to be for his benefit. But is every purchase beneficial - or more so than his sales? 3 Bac 136. 145. Co. L. 2. 38. 1 Rol. 730. 2 Vent 203. Cro. J. 320.

So it is said the power of atty. by an inf. to receive, seisin of an Estate is only voidable, because for his benefit. The rule is true, however false the reason may be. 3 Bac. 136. 1 Rol. 730. 3 Burr. 1808.

So an indenture by an inf. Slave to serve his master, is voidable only - as it may be for his benefit by working an emancipation. 2 H. Bl. 511.

But under the last branch of the rule, it has been said



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said, that a lease by an inf. not reserving rent, was void. Moore 105. 2 Leon. 216. Sw. 64. Dyce 307. Joy 130. 3 Bac. 304. 304. Hull 102. 10 Mod. 421. 424. 436. 533. 12 Mod. 162.

So if only a trifle is reserved & not the full value. 3 Bac. 304.

This rule is disputable: For 1<sup>st</sup> There appears to be no judicial decisions on this point. 3 Bac 137. 304. 3 Burr. 1806.

And 2<sup>d</sup> many weighty opinions are the other way, which say leases by infants are voidable, without any reference to rent. 3 Bac. 304. Litt §. 547. Co. L. 45. 308. 1 Rev. 6. Moore 78. 5 Bac. 535.

And 3<sup>d</sup> Mansfield, in case of Touch v. Parsons, has directly denied the doctrine & indeed disproved it upon principle. For 1<sup>st</sup> It is well settled that an inf. may make a lease, without rent, to try his title - & 2<sup>d</sup> (in *star omnium*) the infants lease can in no case avoid a lease on account of the infants infancy. This amounts to a full demonstration that a lease is only voidable. If it were void, every one might take advantage of it. 3 Burr. 1806. 1794. 1806. 38. 3 Bac. 137. 1 Font. 74. 1 Bl. R. 578. 1 Mod. 25. 9 Vin. 393. 4 2 T. R. 161.

Another reason of 3<sup>d</sup> Mansfield, that an infant cannot plead *non est factum*, & therefore the lease is not void. 3 Bac. 145. Cro. E. 857. 10 Co. 43. 5 Co. 119. - (This argument appears to have very little weight, because a power of atty. (generally) is strictly void, & yet the inf. cannot plead *non est factum*. 3 Ray 315. 3 Burr. 1804. 1808.

So also it is said, that a penal bond by an inf. is void, as it cannot be for his benefit. I do not think

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interest the true criterion in this cases. As the infant is not bound, & can avoid the contract when voidable only, it can be of no disadvantage, but may be of advantage to leave it at his option to avoid it or not. As in all cases of Executory contracts he is perfectly safe (as appears to me) when it is only voidable, why should <sup>they</sup> be absolutely void? 1 Pow. C. 54. 10 Col. 729. 8 Mod 679. 3 Bac. 134. Cro E. 920. 7 Bull. 106. Esp. 164. Pool 58. 5 Bac. 334.

I cannot find that this point was ever decided. Many opinions seem inconsistent with the rule. 3 Burr. 1804. 5. 1 Wood 403. Park § 12. 154. Litt § 259. Co L. 172.

That it is not void on principle, it is said - 1<sup>st</sup>. An infant cannot plead non est factum. This is not decisive. See supra, 3 Bac. 145. Bat. 279. 3 Mod 310. Gil. & Ev. 162. 5 Bac. 337. 5 Co. 119. 2 Reg. 315. 12 Co. 303. Pow. P. 47. 2 H. Bl. 515.

2<sup>d</sup>. If having given a penal bond, he bequeaths property for the payment of his death & obligations, the Ct. of Chy. will order payment of the bond, which they would not do, if absolutely void. 3 Bac. 146. 1 Eq. Ca. ab. 282. 3. 1 Wood 403. 1 Hon 674. 1 Pow. C. 37.

It is questionable then whether the last branch of the rule is law - i.e. whether it forms a general criterion. It is certainly vague - the privilege of infants is guarded without it. It is generally advantageous to the infant. 3 Bac. 138. 139.

The first branch relates chiefly to purchases by infants, & seems agreeable to principle - i.e. is not contradictory.



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= to any settled principle or decided case. & there appears to be no reason opposed to it.

The last branch relates to sales, conveyances & leases made & obligations entered into by infants. 2<sup>d</sup>. But as to sales, conveyances, leases & obligations by infants - the true rule of discrimination seems to be this - All gifts, grants, sales, deeds or obligations, made by infants & which do not take effect by manual delivery, are void. Those which do thus take effect & which are thus delivered are voidable. This rule has been laid down by Perkins & by Coke (who it has been justly said is the Law himself) & was recognized in the case of Touch & Carson. Perk. §. 12. 10. 3 Burr 1804. 5. Litt. §. 259. 3 Bac. 136. 9. Rol. 730. Satek. 10. 5 Bac. 535.

For example - Gift by an inf. is voidable only, because there is a manual delivery, by which it takes effect. 3 Bac. 136. 1 Pow. C. 32. 3. 3 Burr. 1804. 5. Perk. §. 259. 4 Co. 125. 2. 3 Co. 42. Dy. 109. Co. L. 247. a. 380. 1 Fort. 74. 1 Mod. 25.

But it is difficult to lay down a rule of discrimination, & not confound the former & latter part of the rule.

So if an infant sells a horse, & delivers him, the sale is voidable only - if not delivered, it is void, & the purchaser is liable in trespass for taking him. 3 Bac. 139. Perk. §. 12. 19. 1 Mod. 137. Rol. 77. 1 Rol. 730. Satek 10. 1 Mol. 778.

None of our books give the reason of this distinction. I suppose it founded on this - where the contract does not take effect by manual delivery, the other party depends upon

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upon the infants word, & this is regarded in law as nothing. But if there is manual delivery, he cannot contradict his own act, for it changes the very possession of the property:— (my reason a little technical.) 3 B. & C. 139. (Perk. §. 12. 19. 1 Mod. 137. These auth<sup>s</sup>. to the principle supra—

The words "which take effect by delivery" are an essential part of the rule, as to deeds also. & make a difference between deeds which convey an interest, & those which merely delegate a power. The first are only voidable. the last void— e.g. Grants, leases, releases &c. by deed are voidable only— they "take effect" by delivery. i.e. convey an interest. 3 Burr. 1804. 5. Perk. §. 12. 3 B. & C. 136. 304. Litt. §. 259 8 Co. 42. b. Shap. T. 60. 2 B. & C. 91. 4 Cr. 150. 8 Co. 119. (Tid. by Deed.)

But a power of atty. by an inf<sup>t</sup>. is void— it does not "take effect by delivery"— i.e. conveys no interest but only delegates a power. (Set aside in a summary way in Eng.) 3 Burr. 1804. 8. 3 B. & C. 136. 138. n. 142. 2 Rol. 2. May, 130. 1 B. & C. 577. 578. 176. B. & C. 75. 21. Vin. 536.

An Exception before mentioned, is a power of atty. to accept a pension. This is voidable only, as it is introductory to a purchase— & has a semblance of benefit to the infant. 3 Burr. 1808. 3 B. & C. 136. 1 Rol. 730.

Powell denies the distinction, between deeds conveying an interest, & those delegating a power, but gives no reason for his opinion. 1 Pou. C. 32. 3. 3 B. & C. 142. 5 H. 337. Carth. 436. 3 Mod 301. 2 Sw. 218.

Upon the whole the Law under this head appears to me



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me to be contained in the first branch of the first rule, that purchases by infants are voidable only. - In the 2<sup>d</sup> rule, that their conveyances, leases, deeds &c. are only voidable when they take effect by delivery, - but void, when they do not thus take effect.

This appears to me to be the general doctrine, - but perhaps the whole of both the general rules above stated, is to be attended to.

The second seems to me to furnish the true criterion in general, as to conveyances &c. by infants, (at ante.) - Perhaps it ought to be modified by the last branch of the first rule thus. If the privilege would not be sufficiently guarded by construing the contract voidable when an interest passes by delivery, let it be void otherwise, only voidable. Then as to Grants, leases, obligations &c. made by infants, the 2<sup>d</sup> general rule furnishes the general criterion, & the last branch of the first rule forms an exception to it, or modifies it, when necessary for the safety of infants. This is agreeable to Lord Mansfield's opinion. 3 Bur. 1807. 8. 10 Bl. R. 579. 3 B. & C. 139.

Thus in the ludicrous case, of an infant lady's agreeing to sell a Barber 20s of her hair - it took effect by manual delivery, but was declared void, *Saffell v. Barber*. 3 Kib. 349.

So, if an infant sells or delivers a horse to a bankrupt - it is construed void, or he could not recover the horse without the expense & trouble of Trover, &c.

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All agree that executory contracts (as promissory notes, parol agreements, single bill, &c.) by infants are generally voidable only. Esp. 164. 10 Bw. C. 38. 5 B. & C. 140. 1. 1 Mod. 25. 137. Vent. 51. 1 Kib. 1. Stra. 85. 937. 1 Sid. 41.

And upon this ground, a bond of submission to an arbitrator, is said to be voidable only. 5 B. & C. 336. 10y 93. 3 B. & C. 134. 1 Kib. 730. 1 Ser. 17.

If a contract is void, third persons, or the adverse party may take advantage of its invalidity, (as creditors may of a fraudulent conveyance). If voidable, only the party from whose privilege the invalidity arises, & his representatives can take advantage. 4 Co. 124. 8 H. 42. 3 B. & C. 140. 2. 5 H. 337. Carth. 436. Stra. 937. 8. 1 Sid. 41. 446. 2 H. Bl. 511. 1 Tonb. 74. 8. 11y. 515. 6. 3 Mod. 351. 3 Bar. 1804. 6. Vent. 51. 9 Vin. 393.

If a voidable conveyance is made of real estate, only the original party, or his privies in blood, can take advantage of it. Not his privies in estate, as a remainderman, or reversioner. 3 B. & C. 142. 8 Co. 42. 3. Co. 337. 1 Kib. 755.

Voidable contracts may be affirmed by the infant after he attains full age. The confirmation may be express or implied. It is implied when an infant takes a lease & continues in possession after full age. He is then liable for rent, even for that which accrued during his minority. He ratifies it ab initio. 2 Bulst. 69. 5 B. & C. 534. 1 Tonb. 131. 2. 3 B. & C. 145. 1 Kib. 731. Co. 337. 2 Vent. 203. Crof. 320.

Soon after entering an intent to waive the privilege of infancy, confirms the contract. 3 Co. 65. Co. 171. 295. Crof. 320. 2 Vent. 203. Stra. 690.



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But a void contract cannot be confirmed; it is a nullity - e.g. Infant lessee, takes a new lease when of age, of the same interest neither increasing the term, nor diminishing the rent - the 2<sup>d</sup> lease is void - I think a new contract, or a re-execution of the 1<sup>st</sup> one might be made on the 1<sup>st</sup> consideration; for this is as good as a void, as a voidable contract. 2 T.R. 786. 5 Bac. 335. 3 Co. 64. b. 176. Bl. 75. Doug. 53. Comf. 201. 482. 1 Atk 354. 7 T.R. 83. 1 Honl. 74. 137. 1 Pol. 28. 1 Bou. C. 33.

An infant having conveyed by fine or com. recovery (judicial conveyance by matter of record) may avoid the conveyance by writ of error, during his minority, but not afterwards - for his age can be tried only by inspection by the judges - no avowment to be tried by the County is admitted to the record. Co. L. 380. 3 Bac 134. 141. 135. 12 Co. 122. 3 Mod. 229. 12 H. 197. 243. 1 Bou. C. 213.

It is said that an infants conveyance by matter in pais, as by feoffment, (not matter of record) is avoidable either during his minority, or afterwards. 1 Atk. 192. Co. L. 247. 248. 380.

But it seems settled now, that a feoffment by the infant cannot be avoided till after he attains full age - for his re-entry is itself not binding - & of course, if original feoffment remains only voidable, & may be confirmed at full age - therefore a Stranger cannot avail himself of the re-entry - Same is the same if the conveyance is by lease & release. 3 Bur. 1794. 1808. 3 Bac. 136. 1 Bl. R. 579. 2 T.R. 161.

So if an infant makes a lease for years, decided by Lord Mansf. & Hardwick in Ct. of Kings Bench that he may not

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not avoid it till of full age. Justice Buller observes, he is bound by it. i.e. (he means) during his infancy. 2 T.R. 161. 3 Bac. 137. 8 Co. 2. 380. 3 Bac. 140. Contra 2 Butst. 69.

Sales of personal property by an infant are voidable, at any time, I suppose. 3 Bac. 141.

### Exempl cases in Equity.

Marriage settlement agreements, made by infants with consent of parents or guardians, are in most cases binding in Equity. Such agreements being but accessory to the principal or primary contract. 1 Pow. C. 42. 4. 3 Atk. 56. 1 Br. Ch. 152.

Equity assumes a sort of discretionary power over infants & directs their consciences, according to the circumstances of the case, enforcing many contracts which at law are not binding. 1 Pow. 40. 1.

Thus the interest of a female infant in a money portion, has been held to be bound by a family settlement agreement with her hus. before marriage. 3 Atk. 613. Russel. 117. 1 Br. Ch. 111. 4 Cruise D. 14. n. 1 Pow. C. 44. 6. 2 Vern. 501.

It matters not whether the wife's interest is in possession or depending on a future contingency. 1 Pow. C. 46. 7. Ald. 101. 1 Cr. 574. 3 Atk. 608.

So it is well settled that a female infant may bar her right of dower, by accepting under such agreement a settlement by way of jointure. & even tho the settlement is of personal estate. 5 Bro. P. C. 570. 2 Eq. Ca. at. 101. 2. 1 Pow. 3. 53. 10 Cr. 55. Rob. T. Con. 3.



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Whether an infant male can thus bind his real Estate, is said not to be decided. Cruise says he cannot. (now law.) 1 Fonb. 68. 70. 4 Cruise R. 19.

It has been decided that a male infant who lives as a married man, bound by a marriage settlement agreement with his wife, with consent of his parents &c. Stra 504. 20. W. 229. 2 Ch. Ca. 211. 1 P. 52.

And it was held by Lord Maclesfield that if a female infant subd. in fee covenants or marriage with consent of her guardian, & in consideration of a competent settlement to convey her inheritance to her husband (equity will) execute the agreement. 2 Gl. 243. 11 W. 248.

I think this rule is not law. Lord Hardwick says "it is going a great way - viz. where the settlement by the husband is an adequate consideration, & the wife leaves issue." 3 Atk. 613. 5. 11 W. 30. 4 Cruise. R. 16.

But Lord Thurlow says her real Estate is not bound unless she has a settlement & after husband's death takes possession of it. And that the Ct. sh<sup>d</sup> not go into the competence of the settlement. 1 Br. Ch. 116.

He then, is of opinion it seems, that a subsequent ratification, after the wife becomes discoverd is necessary. 1 Br. Ch. 510. 3 Wood 453. n. 4 Cruise R. 17. 8. contra 3. rule of Lord Hard.

At any rate it seems agreed, that such contract by a male infant to bind his real Estate is not binding unless made before marriage. 3 Br. Ch. 514. 3 Atk 56. 1 Fonb. 70.

The general question whether a male inf. can bind his

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real estate by such agreement is said not to be settled. Cruise says he cannot. But it is clear, that if a marriage with an adult, he covenants that her real estate shall be settled to certain uses, he is bound by it. 4 Cruise D. 19. 2 Br. Ch. 545. 1 Fonl. 78.

But no agreement made by an infant or marriage to settle his or her estate, will be enforced, unless it be fair & reasonable - upon adequate consideration. 2 P. W. 244. Pow. C. 47. 1 Br. Ch. 115. 1 Br. 152. 1 Fonl. 69. 3 Atk. 615.

If an infant capable of making a will, bequeaths personal property for payment of his debts, his exec<sup>r</sup> is bound in equity to pay them tho he himself would not have been. 1 Eq. ca. ab. 282. 3 Bac. 146. 1 Pow. C. 87. 1 Wood. 433. 1 Fonl. 74.

At law, as I said before, an infant may ratify his contracts when of age - So in Equity a contract made by another, for an infant, may be impliedly as well as expressly ratified by him after of full age - e.g. Lands belonging to Sir John's children were leased by their mother for 41 years - They having accepted the rent a long time after of age - Chy established the lease. 1 Atk. 489. 3 Bac. 140.

### What powers an infant may execute.

An infant cannot execute a general power or delegated authority, over real estate, for want of discretion. Thus if a man sh<sup>d</sup> devise real property to an infant, to do with it what he pleases, he could not exercise that power. 1 Ves. 298. 304. 3 Bac. 138. n. 3 Atk. 695. Pow. 124. 42. Co L. 52. 3 Atk. 105.

But a naked special power he may execute - For here he is a mere instrument, having no interest which can be.



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affected - & no discretion is necessary. 3 Atk 710, 4. 1. Co. 32. (Pou. P. 43, 48.

But he cannot execute a power over his own inheritance, because he might then evade the disabilities which the law imposes on him. Pou. P. 43. 1210 306.

It is said in Atk. "no precedent in a Ct. of Law or Equity that a power over real estate" may be executed by an inf. This is too unlimited for a rule - general power is meant. 3 Atk. 710. 3 Bac. 138. n. 1210 304. (Pou. P. 43, 7, 8.

The general rule seems to be, that an infant not interested, may execute a power, so as to bind his principal to the extent of it, if it does not amount to a discretionary power over real estate. Pou. P. 43. 1210 304. b.

And he may execute <sup>con</sup>a general power over, personal estate (tho his own interest is affected by it) if old enough to bequeath it by will. - Secus not. Pou. P. 54. 1210 303.

And where an infant, tenant for life, with power to make a jointure, covenanted in pursuance of the power to settle a certain part of the land on his wife for life. the covenant was held good in Equity - There the power was special. - 2 R. W. 229, Stra. 504.

### What offices an infant may hold.

The general rule is, that an infant may hold a ministerial office, requiring only skill & diligence - not a judicial one - e.g. Bailiff - Steward - Factor - &c. 3 Bac. 123, 125. 725. 736. Co. L. 3. C. 656. 7. Com. D. "Officer", B. 3

The reason given why an infant may hold a ministerial office is, that if he is incapable (as before he attains

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to years of discretion) it may be executed by deputy, 3 Bac. 125.  
724. 5. 736. 8. 11 Co. 4. Broc. 279. 556. 2 Hol. 183. 4 Mod 279.

May he then hold any office, which cannot be executed  
by deputy - what would he then do if only 4 years old. Broc. 636. 7.

It is difficult to say what is the law in Conn. on this sub-  
ject - Infants never hold offices here - we have not officers trans-  
missible as in Eng. none but a Shff. can act by deputy.

At C. S. an infant cannot be an atty. for he cannot be  
sworn. 3 Bac. 126. n.

Nor a juror for the same reason - & also, I suppose, be-  
cause a juror acts judicially, 3 Bac. 126. Hob. 325.

May be an Exec. at any age - may act at 17.

Regularly an infant officer is bound by his official  
acts, as an adult - e.g. an infant gaoler is liable for an  
escape - & liable in debt, if the escape is upon execution.  
5 Co. 27. a. b. 3 Mod 222. 2 Inst. 382. 3 Bac. 125. 8 Co. 44. 6. 11 Mod. 364. 2 T. R. 129.

How far an Infant is affected by the nonper-  
formance of conditions annexed to his office or Estate.

Conditions are, Express and Implied.

1<sup>st</sup> By express conditions, infants are bound like adults.  
If then an infant holds an estate to which an express con-  
dition, imposing, a forfeiture is annexed, he forfeits the  
estate by nonperformance. This rule is founded on com-  
mon justice. Co S. 246. 2 Vern 333. 543. 560. 2 Lev. 21. Mart 199. 3 Bac. 129.  
8 Co. 44. Carth. 43.

An exception is, when the condition imposes a pen-  
ty - i.e. a forfeiture distinct from the loss of the estate. In such



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cases, the infant is not bound to pay the penalty - e.g. to pay double rent. 3 Bac. 129. Co. L. 246<sup>b</sup>. West. 200. Earth. 43.

2<sup>d</sup> Implied Conditions may be either at common law or by Statute.

Implied conditions at C. L. are either founded on skill & confidence - or not founded on them. 8 Co. 44.

By the former (regularly annexed to offices) infants are bound, on motives of policy - e.g. Stewardship is granted to an infant in fee. He forfeits the office by wastefulness or mismanagement. 8 Co. 44<sup>b</sup>. Co. L. 233<sup>b</sup>. Ward. 11. 1 Fomb. 82. 3. Cro. C. 556.

By the latter (regularly annexed to estates) infants are not bound, (by privilege of infancy) e.g. Infant livery for life. aliens in fee - this is no forfeiture of the estate. So of a fine. Covert. 8 Co. 44<sup>b</sup>. 1 Rol. 851. Co. L. 233<sup>b</sup>.

As to conditions implied by Stat. law, the rule is - Where the Stat. gives a recovery to the tenant for non-performance of breach of the condition, infants are bound by the condition - e.g. An infant, livery for life or years, forfeits his estate by waste either voluntary or permissive - for the Stat. of Gloucester gives an action to recover the thing wasted, (By C. L. no forfeiture for committing waste, but only damages,) & triple damages. Flow. 364. Co. L. 54<sup>a</sup>. The D. B. 59. 2 Bl. 283. 5 Bac. 474. 8 Co. 44<sup>b</sup>.

But where the Stat. gives merely an entry, but no recovery, infants are not bound by the condition - e.g. infant aliens in mortmain - it is no forfeiture of the estate, (as adult) For the Stat. gives the lord only an entry, but no action to recover. 8 Co. 44<sup>b</sup>. Co. L. 233<sup>b</sup>. 1 Fomb. 82. 3. 2 Inst. 382.

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May not the reason of these distinctions be, that in the former cases, where the Stat. gives a right of action for waste, to recover the estate, it reverts in the grantor. But in the latter case, where the Lord may enter, the Stat. does not expressly take away the estate.

Infants are barred by Stat. of Limitations unless they are specially excepted - (tho in general no laches can be imputed to infants.) The Stat. of Limitation are in the nature of conditions annexed to a right. 3 Bac. 127, 513, 1 Ser. 31. 1 Eq. Ca. ab. 304. Pre Ch. 518.

And if an Exec. adm<sup>r</sup>. or trustee for an infant does not sue within the time prescribed by the Stat. (he having power to sue) the right is barred by the Stat. the exception notwithstanding. This rule must relate to cases in which the Exec. &c. has a right to sue in his own name - e.g. on a contract in favor of the infants father deceased &c. The rule holds in equity, as well as at Law. 3. P. W. 309.

### In what manner Infants are to sue, and be sued.

We come now to treat of the means by which infants may assert their rights, & be enforced as to their duties.

1. How to sue. An infant must always sue by his Guardian, or prochein amy, (i.e. his next friend). He cannot appear by atty. as he cannot appoint one. 3 Bac. 148. Palm. 225. 250. Kirt. 409. 320.

If an infant sues without one of these, the deft. may plead to his disability, & thus defeat the action. 3 Bac. 148. q. 3. 12. 301. Palm. 246. 2. Rd. 287. Co. L. 135. C. 123. 2. 2. 12. 2.



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Generally an Infant <sup>itself</sup> can't appear by Guardian only. But the Stat. 13 & 14, enabled infants to sue by their next friends in certain cases of necessity. 3 Bac. 149. Crof. 640. Palm. 295. Stra. 707. 2 Bac. 680. Kirk. 409.

These cases are four - 1<sup>st</sup> Where he sues his Guardian - 3 Bac. 149. Crof. 640. Hutt. 92.

2<sup>d</sup> Where the suit is vs a Stranger, & the Guardian will not appear for him - & if the Guardian forbids the suit, he cannot sue at all I suppose. Sidm. & Palm. 295. Stra 369. Kirk. 409.

3<sup>d</sup> Where the Infant has no Guardian. Co S. 135. l. a.

4<sup>th</sup> Where he is resigned - i. e. out of the care of his Guardian - 3 Bac. 149. Crof. 640. Palm. 295. b. 2 Bac. 680.

In all other cases, he must sue by Guardian. 3. Bac. 149. Palm. 296.

According to some opinions, however, an inf. may sue in any case by Guardian or next friend - But w. not this take away the Guardians control & authority & why then is one appointed? 3 Bac. 149. Hutt. 92. 2 Inst. 261. 390. Co S. 135. l. a. Crof. C. 86.

If hus. & wife sue, she bring an infant, need not appear by Guardian - Both may appear by attor. named by the husband. 3 Bac. 150. 2 Saund. 213.

When an infant sues by his Guardian, the latter is liable for costs, & is compellable to give security for them. So when the suit is by his next friend. And he is liable to an attachment or non pay. But the Guard. is reimbursed from y. Estate on settling the age of his Guardianship. 2 Bur. 680. 1 Eq. Cab. 72. Barnes 8. 128. Stra 506. 1020. 10. R. 496. 1 Wils. 130. 1 M. & Bal. 60. Hallok 224.

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According to some opinions the infant is also liable for the costs, & the Df. may proceed w<sup>th</sup> either at his election. Zell. L. ex. 87. 2 P. W. 298.

The rule laid down in P. W. was denied on a rehearing by L. King, who said that there was no decision, that an infant p<sup>er</sup>ff. was not liable for costs, in law or equity. (He need not find p<sup>er</sup>ff. at C. L.) This seems to be the better opinion. It sh<sup>d</sup>. be reserved to be allowed, or not, on settlement of the Guardianship account. Str. 708. Bro. E. 33. 1 Bulst. 109. Bro. C. 166. 3 Bac. 147. 2 Eq. Ca. at. 238. Mitford, pl. ch. 26. Wils. 130. Hullock 223. 224. Co. L. 127. 8 Co. 61.

"If costs cannot be given", those awarded vs an infant p<sup>er</sup>ff. would be error. 2 Str. 1217. Sayus costs 93. Barnes, R. 105. 128.

Infant Df. is clearly liable for costs when judg<sup>t</sup> goes vs him, he is always supposed in fault. Str. 1217. Dyer 104. 1 Bulst. 189. Hullock 226.

It is said that the Guardian on record of an inf. d<sup>is</sup> is liable to costs, (2w.) & if so, he is liable in the first instance. Esp. Di. 164.

In Eng. both the Guardian & prochein amy must be admitted to ~~proce~~ appear by the Ct. or by writ out of Ch<sup>anc</sup>. that the infant may not be injured by having his interest committed to improper hands. 3 Bac. 148. 1 Str. 304. 709. L. Ray. 232. Palm. 225. 250. Garth. 256. 3 Atk. 603.

In Conn. when the suit is brought by a Guardian our Ct. I believe, never enquire into his qualification. But if by a next friend, he is to be admitted by the Ct. tho a tacit adm<sup>t</sup>. it has been s<sup>d</sup>. is suff<sup>t</sup>. - Du. at present. - Jeffrey v. Bishop, Sup. Ct. Vt. 410. 419.



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Any one may bring a Bill, as next friend, for an infant. Even without his consent. (for he does it at his own risk) - i.e. may commence the suit, but may be disqualified by the Ct. 2 Bac. 680. 3 W. 149. 151. 189. Ca. ab. 72. Hilt. 411. 1 Bl. 464.

If an infant & an adult are ex<sup>ts</sup> in an action by them, both may appear by atty. for the suit is in autre droit - And the adult may appoint an atty. for both. But if they are sued, the inf<sup>t</sup> must appear by Guardian. 3 Bac. 150. n. 151. n. 1 Rol. 288. Cro E. 278. 541. 2 Saund. 212. 3. Vent. 102. L<sup>d</sup> Ray. 232. 600. 1449. Stra. 784. Sti. 318. 3 Mod. 236.

So, it seems, if an infant, sole ex<sup>or</sup>. sues alone, he must appear by Guardian - 3 Bac. 150. n. Cro E. 420. 441. (X Carth. 123. 2 Saund. 213.)

He need not, if adm<sup>t</sup>. Vent. 102. 3.

II<sup>d</sup> How to be sued. An inf<sup>t</sup> def<sup>t</sup> must always appear by his Guardian - not by prochein amy - for the Stats. 1 & 2. Westm. do not extend to actions vs infants. The plea is signed by the Guardian. 3 Bac. 148. Palm. 225. 250. 2 Bac. 680. Cro E. 640. Hilt. 92. Co L. 131. Hob. 266.

And in an action vs the hus<sup>d</sup> & wife (the wife being an infant) she must appear by Guardian. His being the next friend does not enable him to act for her as def<sup>t</sup>. Otherwise, when she is a p<sup>ss</sup>. I have had some doubts on this rule, but do not find it any where denied. 3 Bac. 150. 1 Rol. 288. Vent. 185. 2 Hilt. 878. 1215. 91. 160.

If an infant having no Guardian is sued, the Ct. (usually at the instance of the p<sup>ss</sup>) must appoint one, pro re nata - called Guard. ad litem. This is generally some atty. at the bar. 3 Bac. 149. 150. n. Sti. 364. 5 Co. 83. Co L. 89. 135. 2 Lev. 135. 3 Bl. 427.

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But if the infant has a Guardian, the Ct. cannot appoint one *ad litem*, unless the former is out of the reach of process, or has mis demeaned himself. 3 Bac. 150. n. 1 Sid. 424. Sti. 456.

The process does not abate, because the Guardian is not summoned. Time is given to cite him to appear at least so in Conn. Title "Plas" &c.

(By the Guardian in the general rule is meant in Eng. one appointed for the infants suits in general, (not for his person or estate,) by letters patent out of Chy. or one appointed by the Ct. in which the suits arise. hereafter.) Co L. 135. b. n. 2 N. B. 27. 2 Bac. 679.

If an inf. *quid* appears by atty. & judgt. is given to him, it is erroneous, (in fact, not in the original record). writ of error *coram vobis* lies. (generally issued by the Ct. which rendered the original judgt. 3 Bac. 149. Moore: 665. Crof. 640. Hunt. 92. 2 Bac. 218. 4elv. 58.

Should the assignment of the error conclude with a verification, or to the Country? It sums with the former. 1 Bur. 410. Carth. 367. 4elv. 58. con. 2 Bac. 218.

So if his Guardian is not cited & judgt. goes v. him by default, it is erroneous. Rirb. 116.

So, it sums, if an inf. *plff.* appears by atty. & judgt. goes v. him, it is error. 3 Bac. 150. n. Crof. 441.

But by Stat. 21. Jac. 1. if judgt. passes for him, after verdict, the party opposed cannot reverse it. 3 Bac. 149. n. 150. n. Crof. 580. 2 Bac. 198. 1 Bac. 90.

If an infant *quid* with others, who are adults, appears,



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by atty. & entire damages are given vs. them, in Eng. the whole judgt. is erroneous. 2 Bac. 198. 228. Cro. J. 289. 1 Kol. 776. Ali. 406. Leath. 367. 2 T.R. 435.

The rule is otherwise if damages are severally assessed. it seems more probable that judgt. is then reversed as to the infant only. For this is substantially as if there had been several distinct judgments. 5 C. 58. Stra. 184. 808. 4 Bur. 2022. 1 Kol. 747. 776.

And in Con. it has been settled (contrary to C. D.) that where adults & infants are sued together as trespassers (the Guardian not being cited) the judgt. as to them is erroneous, as to the infants only, tho' the damages were entire. The rule is reasonable, for each is liable for the whole, & not a partial contribution only. But Qu. in case of contracts. Kirt. 116.

In Eng. if an infant & adult join in a fine, it may be reversed as to the infant only. I suppose because their interests are distinct. This fine altho in the form of a judgt. is merely a common assurance, or a deed executed by matter of record. Falls within the rule that where an infant & adult contract, the latter only is bound. ) 2 Bac. 229. Hob. 278. Cro. E. 115. 124. Moore 565. 2 Leon. 108.

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### How far the Law regards Inf<sup>s</sup> in ventre sa mere.

Infants unborn, are to many purposes, considered as in spo. & in several cases now, in which they formerly were not. 1 Bl. 130.

The killing of an unborn child is no murder but a great misprision - (i.e. highest sort of misdemeanor in its limited sense.) 3 Bac. 665. 4 Bl. 198. 1 Hawk. 121.

But if the child having received a mortal wound or injury in ventre, is born alive, & then dies of the wound &c. within a year & day after the injury done, it is murder - (i.e. it seems it may be murder.) 4 Bl. 197. 8. 1 Hawk. 121. 3 Inst. 50. x 1 Hale 433.

An inf. in ventre, &c. may inherit, but till the birth, the interest descends to the heir presumptive. Doug. 481. n. 2 Bl. 208. 10 W. 486. 5 T. R. 60. 7 Rob. 3. 1609 5<sup>th</sup> 99<sup>th</sup>.

An unborn inf. may take by devise as y. Law now is, formerly had not. - 3 Bac. 124. Farn. 429. 432. Co. - 8. 11. b. n. 4. 4 Bur. 2157. 3 Wils. 526. 1 Bl. R. 843. Carth. 309. Salk. 228. 9. 1 Trum. 244. 1 Sid. 153. 1 Lev. 135. 2 Wils. 225. 10 W. 486. 2 P. W. 28. 1 Wils. 114. 1 Br. Ch. 386. 5 T. R. 49. 51.

So as to a Legacy - 1 Sid. 116. 1 Br. Ch. 386. 1 Bl. 130. 1 R. 10<sup>th</sup> 243.

For the distinctions, see title "Devises, p."

An son. might not such child take by Dad as well as by will - provided to commence in futuro. H. C. 24.

The estate descends to the heir presumptive & vests in him till the birth, for the child may be born dead. 2 Mod. 9. 10 W. 486. 2 W. 28. 1 Wils. 114. 1 Br. Ch. 386. 5 T. R. 49. 51. 1 Lev. 135. Moore 177. -



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Such inf. may also under the Stat. of distributions take a distributive share of the personal property. 2 P.W. 446. Barnard. 290. 2 Atk 117.

So, may take under a term (or other trust) for raising portions for such children as A. shall have living at his death. Posthumus promato habetur. (Re. Ch. 50.) 1 P.W. 246. 342. 2 H. Bl. 399.

So under a bond, in favor of such children (see supra.) 2 Freeman. 223.

An injunction ~~not~~ waste lies in behalf of such a child - for if the law allows an inf. ~~or~~ a mere to inherit, it certainly sh<sup>d</sup> take care of the inheritance. (Re. Ch. 50.) 2 Burr. 10. 11. 2 Atk 117. 3 Bac. 123.

Under Stat. 12 Car. II. an unborn infant may have a testamentary Guardian - i.e. one appointed by the Father, or, by deed or will - 1 Bl. 130. 462. 466.

May be an Exec<sup>r</sup>. but cannot act till 17. and if two are born, they shall be Co-executors. 3 Bac. 123. 1 Com. 235. 5 Co. 29. Wentw. off. Ex. 307.

So if one devises or bequeaths to the unborn child of A. and 2 or more are born, they take jointly. 3 Bac. 123.

### Of the relative rights & duties of Parents & Children.

The inquiry under this head, renders it ~~un~~ necessary to consider the distinction between legitimate & illegitimate or bastard children - For these rights & duties are different, when referred to these two classes of children. -

First.

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First, then, who are Legitimate & who are Bastard Children?

A Legitimate child is defined to be one born in lawful wedlock, or within a competent time afterwards. 1 Bl. 446. Co. L. 244. Crof. 541.

That is, no other than a child thus born, can be legitimate. But it is not true, converso that every child born, ut supra, is legitimate, tho prima facie he is. Esp. 483. Str. 940. 5 Co. 98. 1 Bl. 457.

An illegitimate child is defined to be one begotten & born out of lawful matrimony, - in other words, not begotten, nor born, during lawful wedlock. 1 Bl. 454.

This definition, I conceive, is incomplete. Suppose that after the conception, the parents intermarry & that the father dies before the birth. Is not the child legitimate? He is according to the above definition of a legitimate child.

My definition of a legitimate child is: one begotten out of lawful wedlock, & not born either during lawful wedlock, or within a competent time afterwards, or neither begotten nor born in lawful wedlock, nor born within a competent time afterwards.

The definition before given of a legitimate child amounts only to this: that if a child is born during lawful wedlock & the presumption is very strong that he is legitimate. 1 Bl. 457.

Thus anciently no other proof of illegitimacy was admitted in such cases, than such as rendered legitimacy impossible.



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impossible. (proof of improbability was not sufficient, and the fact could be proved only in two ways - 1. By shewing impossibility of access to the wife by the hus. Co L. 244. 5 Co. 98. 2 ultra. 176. 940. Salk. 123. 1 Bl. 457.

And 2<sup>d</sup> by shewing his impotency. But the rule is much relaxed. (post.) Idem.

1<sup>st</sup> Formerly no other proof on non access was admissible, than that of husband's absence - extra quatuor menses, from the time of conception to the birth. Absence within the realm was not provable. Co L. 244. 1 Rol. 358. 1 Bac. 310. Salk. 122. 3. 483. 2. 395. Esp. 483. 1 Bac. 311. Earth 122. 1 Bl. 457.

Hence if the hus. had been absent for any length of time, & his wife sh. have a child however soon after his return, the child w. have been legitimate - hus. not being impotent.

So if after absence beyond sea for 20 years, he should return & marry a woman, who sh. be delivered next day, the child w. have been legitimate. Co L. 244. Salk. 122. 484. 2 Rol. 385.

2<sup>d</sup> As to husband's impotency - formerly this fact c. not be proved, otherwise than by want of age. 1 Bac. 310. 1 Rol. 358. Co L. 244.

According to some, the age of impotency, is any age under 14. According to others, the age of 8 is the limit. 1 Bac. 310. 1 Bl. 457. Co L. 244. 1 Rol. 358. 9.

The evidence admissible under these rules, is supposed to prove impossibility of legitimacy.

No similar rules in Conn. & the old ones are now established in Eng.

1. Non-access may be proved by other evidence than that.

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that of absence, *extra quatuor maria* - The question is left to the jury, upon the special circumstances of the case - & they may find non-access, tho the hus<sup>d</sup> has been within the realm. Co. L. 244. 30. W. 275. b. 5. Mod 419. Stra 925. Esp. 484.

2<sup>d</sup> Impotency may also be proved by other evidence than want of age - as by husband's state of health. Esp. 483. Stra. 940. 1 Bac. 311.

These rules also seem to admit no other proof of illegitimacy than what amounts to an apparent impossibility, &c. Esp. 483. Stra 940.

It is lately settled, that other evidence than that of non-access & impotency is admissible to prove illegitimacy - e.g. that the mother cohabited with A. - that the child was reputed a bastard, called by the name of A. - & that J. mother or took his name &c. This goes to prove improbability only - it furnishes no direct proof of non-access, or impotency. Cowp. 394. 4 T. R. 354. Esp. 484.

The issue of a marriage, which is null, *ab initio*, is illegitimate - So in case of a total divorce, for causes existing before the marriage, & rendering it unlawful. 1 B. L. 435. b. 456. 440. Co. L. 235. 1 Bac. 311. 1 Pol. 357. b. 360. 7 Co. 41.

But the legality of a marriage, not absolutely null can be called in question, only during the lives of the parties. (Founded on the ecc<sup>e</sup> reason, *pro salute animæ*.) Upon this is founded the maxim that issue cannot be bastardized after the death of either of the parents - (i.e. issue born during lawful wedlock &c.) - 1 B. L. 440.

- A child begotten & born after divorce *a mensa et*



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Child, is presumed to be illegitimate. Otherwise in case of a voluntary separation. The presumption in both cases may be rebutted. 1 Bl. 457. Dal. 120. 1 Mac. 311. 7 Co. 42. 1 Mel. 359. Esp. 484. 8 Stra. 925. 4 Will. 356.

When the question of legitimacy depends upon that of access, the wife is not admitted to prove non access. This rule is founded in decency, morality & policy. Others may prove it. But she is admitted to prove her own incontinency, from the necessities of the case. Coup. 594. Bull. 112. Esp. 485. 11 Will. 340.

She is a good witness to prove the time of the child's birth. & the fact of marriage. So is the Husband. Coup. 594.

So declarations of the father or mother, as to the child's being born before their marriage, may be proved, after their death. This is not bastardizing one born during wedlock &c. the credit of disputed declarations is left to the jury. So an answer in Chy by either parent is good evidence. Coup. 591. 4.

So tradition, common reputation, or entry in a family Bible, inscription on a tomb stone &c. are good evidence as to the time of a child's birth. Coup. 594. Chalk. Ev. 11. 12. Bull. N. P. 233. 294. 5. 7. 7 R. 3.

By the civil & canon laws, a child born before marriage is legitimated by a subsequent intermarriage of the parents. Not so by the C. S. & our own. 1 Col. 624. 1 Bl. 454. 6. 6 Co. 65.

So, all children born of a widow so long, after her husband's death, that by the usual course of gestation, they cannot be his issue, are bastards. for they come not within the rule "born within a competent time after marriage." 1 Bl. 458. Coup. 594.

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What is the "competent time" mentioned in the definition (i.e. within what time after the husband's death, a child must be born to be legitimate) the law does not exactly ascertain - indeed it belongs to obstetrics, rather than Law. 1 Bl. 456. Cro. 541. Esp. 485.

According to some opinions, 9 solar months & 10 days are the usual time of gestation - i.e. 280 days, allowing 30 days to a month - or averaging the months of the year, a little 285 days. according to others 40 weeks, = 280 days - Palm. 4. 1 Mol 356. 1 Bac. 312. Co. L. 123<sup>c</sup> n. 12. 1 Bl. 456.

Coke says 9 solar months, or 40 weeks are the ultimate or farthest limit - this is incorrect - yet 9 solar months seem to be the usual time. Co. L. 123<sup>c</sup> n. 12.

It is agreed that the usual time may be shortened or prolonged by various causes. 1 Bac. 312. Palm. 4. Cro. 541. 1 Mol. 356.

The rule is that a child born within the usual period of gestation, computing from the husband's death, is legitimate. i.e. presumed so, as if born during wedlock. 1 Bl. 456. Palm. 4. 1 Mol. 356. 1 Bac. 312. Co. L. 8.

But one born 9 months & 13 days after, has been held legitimate - the mother having suffered much hardship. So, one born 9 months & 20 days after, under special circumstances. 1 Bac. 312, Cro. 541, Bull. 114. Esp. 485.

If a widow marries immediately on her husband's death, & a child is born within such time, as that according to the usual course of gestation it might be the child of either husband. The child may, when of the age of discretion, choose either of them as Father - 1 Bl. 456. Co. L. 8. 1 Bac. 312. 1 Mol. 357.



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It is said that one may not be bastardized (i.e. proved to be a bastard) after his own death, because personal defects die with the person. 1 Bac. 315. 7 Co. 44. Jenk 268. Co L. 334. 245.

But this rule holds, only as between bastard *eigne* & a mulier *puisne* - i.e. between a son born before the intermarriage of his parents, & the lawful issue of the marriage. (Bastardizing by impeaching a void or voidable marriage, is a distinct thing.) Esp. 486. Salk 120. 3 Lev. 410. 1 Bac. 315. n.

If then a bastard *eigne* enters upon his father's estate, & dies seized, his issue shall hold to the exclusion of the mulier *puisne* - 7 Co. 44. Jenk 268. Co L. 334. 245. 1 Bac. 315.

But to exclude the mulier *puisne*, there must have been an uninterrupted possession by the bastard *eigne*, & a descent to his issue. Hence, during his life, the mulier *puisne* may evict him. So if his issue is unborn at his death. Co L. 244. 1 Rol. 624. 1 Bac. 316.

## Rights & Incapacities of Bastards.

A Bastard's rights are such only as he can acquire. for he can inherit nothing, being called *nullius filius*, or *filius populi*. It is also said that he is not of kin to any one, except his own issue. 1 Bl. 458. 2.

But the maxim, that he is *nullius filius*, does not hold to all purposes. e.g. not to marriage within the prohibited degrees. 5 Mod. 168. 2 Ray. 68. Comb. 365. Com. 4. 2. 1 Bl. 458.

Not to cases, in which the law requires the consent of either parent, to a child's marriage. 17 Bl. 96. 100.

And it seems to apply only to the law of inheritance, as Justice Buller says. (17 Bl. 101.) - And Littleton says.

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"a bastard is quasi nullius filius, because he cannot inherit. Litt. §. 188. Co. L. 123. 1 Bl. 458. 9. 1 Bac. 309. 1 Sw. 212.

A Bastard has no surname by inheritance (as legitimates have) but may acquire one by reputation (continued for some time.) 1 Bl. 458. 9. Co. L. 3.

And he may purchase by his name, thus acquired, as by the name of J. S. (see Fille "Deviss." p. ) Co. L. 3. 1 Sid. 194. Pou. D. 319. 338. Dy 313. Park. §. 26. Park 239. 1 Atk. 410. 1 Bac. 309.

So by the name & description of A. the son of J. S. he having gained the reputation of being the son of J. S. Pou. D. 338. 1 Atk. 410. Moon 10. 6 Co. 65. 2 Rol 43. 4. Co. L. 3. 6. 1 Com. 583.

But by the description of "issue" it seems he can never take. I suppose because "issue" is generally used as synonymous with "heirs of the body." & he cannot be heirs in any sense. Co. L. 3. 6.

I think this is going too far, & that the rule is too general - for "issue" & "heirs of the body" are sometimes words of description.

But he cannot gain a surname by reputation - or the reputation of being child to J. S. but by continuance of time. Bro. E. 510. Pou. D. 338. 9. Co. L. 123. 6 Co. 65. 1 R. W. 529. 1 Bac. 309.

Now if a contingent remainder is limited to the eldest son (whether legitimate or illegitimate) of J. S. (who has no son) & he afterwards has an illegitimate son - he cannot take - for at his birth he has not the reputation of being the son of J. S. and it is uncertain whether he ever will. Co. L. 3. 6. 6 Co. 65. Bro. E. 510.

But it has been said that such a limitation to the



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Eldest son of Susan D. will ensure to her bastard son after-wards born, because he acquires the denomination of her child, he being born of her, so that there never is any uncertainty as to the person. If therefore uncertainty in the person is the only objection, it seems obviated in this case, & the limitation seems good. 1 Bac. 309. Joy 33. n. 28.

But is it not limited to too remote a contingency? allowing that there is no uncertainty as to the person, when born, is not the future birth of a bastard itself *potentia remotissima*? Hargrave leaves it in dubio: tho' from his note, the latter opinion seems to be as the limitation. 2 Bl. 170. Cro. E. 510. 1 P. W. 529. Co. L. 2. b. n.

A bastard can have no heirs, except of his own body - for all other kindred must be traced thro' a common ancestor & he has none - Co. L. 2. b. 1 Bl. 459.

In Eng. a Bastard's settlement is regularly in the parish in which he is born. Derivative settlement is a species of inheritance, by legitimate children only. If the child lives with the mother for nurture, in another parish, still that in which he is born must support it. 1 Bl. 382. 2. 459. Sal. 427.

There is an exception to the rule, which a fraud is practiced on the parish, in which the child is born. e.g. If the Mother is sent by order of Justices to a parish, to which she does not belong to be there delivered. In this case, the child is settled in the parish, from which she was sent. 1 Bl. 459. Sal. 121.

So, if she goes to beg, to such parish, it is apprehended for

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for vagrancy the child born there, is settled in the parish to which she belongs. 1 Bl. 459.

The maxim, that he is nullius filius, I conceive applies as far in Conn. as in Eng. except that the mothers place of settlement is here transferred to the child. 1 Pur. 189. 1 Root 155.

### The Duty of Parents to Bastard Children.

The duty of parents to such children, consists chiefly, in their obligations to maintain them. As to the mode of enforcing this duty in Eng. see. 1 Bl. 457. 8. 1 Bac. 317. 1.

Tho the relation of parent & child is not recognized as to purposes purely civil, yet as to certain natural duties it is - 1 Bl. 457. 8.

The law in Eng. on this subject depends upon the Stats. 18. Eliz. 7 Jac. 1. - 3 Car. 1. - 13 & 14 Car. 2. - 6 Geo. 2. - 1 Bl. 458.

In Conn. as in Eng. both parents are chargeable for bastards support. 1 Pur. 208. St. C. 99. 101.

As to the mode of proceeding in case of bastards, 2 or 3 pages of municipal regulations in Conn. were omitted in these notes for which see Swifts System.

If the reputed father when tried is found guilty, the judgment is that he find surety or be stand committed. This judgment in Eng. is called an order of filiation. Stat. C. 54. 5 T. R. 373.

If the woman dies or marries before delivery, or suffers an abortion, the wife is discharged. 1 Bl. 458.

What the mother has sworn, on her examination before the magistrate, is good, even in Eng. after her death, to support an order of filiation. So in Conn. 5 T. R. 373.

In Eng. on a prosecution by the Town or parish officers, the



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the mother is not compellable to testify who the father is, till after a month from her delivery. 1 Bl. 458.

<sup>By</sup> trial of these prosecutions, was originally by the Ct. This is still the practice. But it is said, that it may be by Jury - Judge (Tum) -

### Reciprocal rights & duties of Parents, & Legitimate Children.

1. The duties of parents to such children, consist principally in three particulars - Maintenance, protection, & Education. 1 Bl. 446.

<sup>1st</sup> The duty of maintenance is founded in natural law. Those who have given life, ought to preserve it as far as they are able. This duty is reciprocal - consists in providing necessaries. 1 Bl. 453.

The obligation of parents to support infant children, when able to do it, is absolute & unconditional. Infants, in judg<sup>t</sup> of law, are never supposed able to support themselves. 1 Bl. 449. 1 Sw. 204. 1 Br. Ct. 268, 387. 1 Bro. 160. 3 Atk. 399. 2 Com. 230.

This duty is enforced in Eng. by Stat. 43. Eliz. & in Conn. by a Stat. 1 Bl. 448. Stat. C. 282.

This obligation under these Stat. extends to grand parents, as well as to parents. And it does not cease with the infancy of the children, & grand-children. For by these Statutes all persons who are poor, impotent, or unable (thro want of understanding, age or infirmity) to support themselves, shall be supported by their pa-

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parents, or grand parents, if of sufficient ability. 1 Bl. 448. q. 1 Sw. 204. St. C. 232. 3. Stra. 190.

But parents &c are not bound to support their adult children &c if the latter are able, by labor or otherwise, to support themselves. 1 Bl. 449. 1 Sw. 204.

On the other hand the same obligations under our law, rests upon children & grand children - the parents &c being unable to support themselves. St. C. 232. 3. 1 Sw. 204. 5.

In Eng. children are under the same obligation - But, it seems, grand children are not. Stra. 190. 2 Bulst 345. Sti. 283. 1 Bl. 454.

The obligation on Towns here, & parishes in Eng. to support paupers, is only secondary - (Towns are liable in first instance. Stat. 242. 343.

Grand parents are not liable, if the pauper has able parents - nor grand children, if children are able. Suppose the parents are able to afford only a partial support - are not the G<sup>d</sup> parents bound to contribute? & so of grand children, &c.

If in Conn. a man marries a woman having children by a former marriage, he is bound to support them, says Judge (Rice) according to the received opinion, during infancy, whether or not she was able - i.e. if he is able - & so is entitled to their service - This w<sup>d</sup> be humane, but I think is not law. At any rate his obligation w<sup>d</sup> cease with the coverture. 1 Root 250. 361.

In Eng. a man is not bound to support his wife, child



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children, by a former marriage, even during coverture. No question is made as to the wife's liability, at the time of the marriage. 2 L. R. Kay. 1154. 12 R. 119. 1 Sel. N. P. 204. 3 Esp. R. 1. 2 Bulst. 346.

For the Stat. 43 Eliz. extends only to natural relations. Is not our Stat. thus confined? *Stea.* 190. 955. 1 Sel. 114. *Sti.* 282. 1 Br. Ch. 208. 2 Vent. 353. *Kirt.* 156.

And maintenance by the second hus. is a suff. consideration for a promise by the children, when they attain full age, to repay the expenses. 4 East 76. 1 Sel. N. P. 297.

But is not this the true principle (for I think it just) that the hus. is bound (being of ability) if the wife was; for he takes her cum onere otherwise not? 1 Br. 448. *Sti.* 283.

If so he ought to be liable here, unless the wife was - & he ought to be liable in Eng. if she was. 1 Br. 448.

Clearly a man is not bound, either here or in Eng. to support his wife's parents - on motives of domestic, id. - But ought not her property to be liable, if she was bound? *Stea.* 190. 2 Bulst. 345. 1 Root 250. 361. *Kirt.* 155.

So one is not bound to support his sons wife, after a divorce a mensa et thoro. This rule seems to imply that he must support her before such divorce. *Stea.* 955.

Suppose a pauper has parents, & children able to support him, who are liable? parents or children. I think both equally, -

But this duty to support children does not disable any one to disinherit his children by will, either in Eng. or here. There is little danger of an unjust disinheriting, by

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by a parent, & to take away the power w<sup>d</sup> be to break down all law on the subject. 1BL. 449. 50.

By our Stat. if a man dies without issue, leaving a widow, who is unable to support herself, & who has no relations bound to support her (at supra) his estate, in the hands of heirs & legatee, is charged with her support during widowhood. St. C. 384.

For the mode of enforcing the duty of maintenance in Eng. see 1BL. 448. 9.

For the mode in Conn. see Stat. C. 233. 382. 3. Rev. 60. 168.

An action lies in Conn. for necessities furnished to minor children. 3 Esp. St. 1. 251. 5 H.

2<sup>nd</sup> Protection. The duty of protecting children is also founded on natural law, but is rather permitted than enjoined by municipal law. 1BL. 450.

Thus it is permitted a parent to maintain & uphold a child in law-suits, without incurring the guilt of maintaining quarrels, or "maintenance". 1BL. 450. 2 Inst. 564.

So he may justify a battery in defence of his child, i.e. may use the same violence, which the child himself might. - 1BL. 450. 1 Hawk 131.

See a case of manslaughter in defence of a child. 1BL. 450. 1 Hawk. 83. Cro. 4296.

And these privileges are reciprocal, i.e. a child may act codem modo to a parent. 1BL. 454.

3<sup>rd</sup> Education. Parents are bound to give their children suitable Education. It is a natural duty. 1BL. 450. 1.

There is no provision in Eng. to enforce this duty, except



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that poor children, may be bound apprentices by the overseers & justices. & that parents are forbidden (under a penalty) to send children abroad, to be educated in the popish religion. 11 Bl. 428. 451.

For the regulations in Conn. see Stat. C. 60: 123.

The duties of children to parents consist in their obligation to obey & be subject to them during infancy, to support them when poor, & to protect them when necessary. 11 Bl. 453. 4.

### II.<sup>d</sup> As to the Rights & powers of parents.

1<sup>st</sup> The parent has a right to correct his minor child, in a reasonable manner. This right is said to be founded on the parents duty. 11 Bl. 452. 17 Haw. 130.

But if the parent exceeds the bounds of moderation & reason, & is influenced by malice, the child may have an action by prochein amy.

It seems that there must be unreasonable correction & malice to subject the parent. 17 Haw. 73. 4 Kil 65.

For the authority being in a great measure discretionary, he is not liable, for slightly exceeding the limit prescribed in the rule. nor for a mere error in judgment as to the proper degree of correction. as this w<sup>d</sup> destroy family government.

This power of correction may be delegated by the father to a master (or schoolmaster). the latter is then, as to his duties, in loco parentis. but may not delegate the power to a 3<sup>d</sup> person. 11 Bl. 453.

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2<sup>d</sup> The consent of the parent to the marriage of a child under age is also necessary by the Eng<sup>l</sup>. Law & our own. 113L.452.

3<sup>d</sup> A father has no power over his infant child's estate, otherwise than as trustee or guardian - liable to account when the child is of full age - or as the case may be before - 113L.452.3.

A minor is entitled to all the property he acquires, otherwise than by service - e.g. By gift, grant, legacy, &c. - But

4<sup>th</sup> The father is entitled to whatever his infant child acquires by service - for he is a servant to his father. 113L.453. 12L.206.

And a gift to the child of his earnings, would not be good, if it w<sup>d</sup>. defraud creditors. (Judge Keene.)

Hence the parent is entitled to an action per quod, as any one, who has beaten, or otherwise injured his infant child, so as to occasion a loss of his service - as in case of a servant. Esp. 645. q. 60. 113. 113L.453.

So for enticing away one's child. 12L.203.

Tho if an infant has been beaten or injured, he is entitled to the damages, for the immediate personal injury. Cro. E. 55. Esp. 646.

If the parent has incurred any actual expense in consequence of the injury done to his child, as in the cure of a wound, he may recover that also, in his action, if specially laid as a ground of damages in his declaration. 2. Ray. 259. 3 Wils. 18. So



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So an action lies for a parent, to any one, who has seduced his daughter, & made her pregnant per quod servitium amisit. The loss of service is said to be the gist of this action - it was certainly the original, & is now generally considered as the nominal ground of the action - i.e. as that without which no action lies. 2 Ray, 1032. Esp 645. 3 Burr. 1879, 2 T.R. 168, 2 Ser. 65. 1 Bulst. 373. Cuius 789, 770. Li. 398. Rolt 393, 46. M.D. 12.

So decided by the Supr. Ct. in a suit by Guardian for taking away his ward. 2 Root 320.

The expense incurred by the parent, during her illness, may also be recovered, if specially laid. would not this alone support the action? 3 Wils. 19. Ray, 259.

In a case in Burr. the daughter, aged 23 years was not proved to be a servant - nor was it stated that the paff. was obliged to support her. 3 Burr. 1878. 1 T.R. 168.

But the loss of service is not the rule, nor the principal ground of damages. But the injury & disgrace occasioned to the family is. For 1. Evidence of the slightest service is sufficient - as if she only milked cows, &c. 3 Wils. 19. Esp. 645. Saur 678. 2 Ser. 62. 1 Root 472. 1 T.R. 168.

2<sup>d</sup>. An action lies for damages, even tho the child in a pecuniary view is a burden, & no profit to p. parent. E.g. In case of a nobleman's daughter who only lies his cravat once a week. Peck 55.

3<sup>d</sup>. The character of the daughter determines in a great measure the quantum of damages. & evidence of her intimacy with other men, goes in mitigation of damages. Root 472.

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4<sup>th</sup> In Con. actions of this kind have failed, notwithstanding standing loss of service, when there was no seduction, as in case of a prostitute. (*Judgments*.)

So in Eng. if the Father has permitted the deft. when a married man, to visit the daughter (*Peake 39, 241. Bull. 27.*)

But still it has been held both in the older & modern cases, that the action does not lie, unless the daughter is, in some way proved to have been a servant to the parent. *2 Kay. 1032. 3 Burr. 1879. 2 T.R. 168. 6 M.D. 127. 11 B. & C. 370. 6 Bro. 769. 770. Sti. 398.*

*L. Kingon* has lately decided that she <sup>need</sup> not be proved to have actually served her parent - but that it is <sup>suff.</sup> if she lives in his family, - as she is then deemed a servant, I suppose. But I think the rule does not apply to adult daughters - only to minors. (*Peake 55. 233.*)

The age of the daughter is, not material, if she acted as servant to her parent - no contract of service is necessary - If under age, she is a servant of course. I conceive (unless she serves another without wages, or receives them herself. *2 Wm. 3 M.D. 18. 2 T.R. 166.*)

It is said by *Esq.* that the daughter sh<sup>d</sup> be resident in her father's house at the time of the injury done. He cites *Burr.* - I think the rule is not correct in all cases. As if she is an infant at a boarding school, or serving another family for the benefit of the parent. *Esq. 645. 3 Burr. 1878.*

If an adult, this may perhaps be necessary, because she w<sup>d</sup> not otherwise be a serv<sup>t</sup>. As was the case in *3 Burr. 1878.*



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It is also said by Esp. that D. Mansf. held in Burr. she must be a minor. But neither he nor any other judge in Eng. held any such opinion, & the case in Burr. furnishes no ground to believe that he did. 3 Burr. 1578.

The action also lies for one standing in loco parentis, as an aunt, or a master. 2 T. R. 4. Pink. 55.

An action merely for seducing &c. per quod it is substantially an action on the case, for the damages are consequential. 2 T. R. 482. 2 T. R. 1032. 117. Esp. 645. 1 T. R. 167. Bac. = 567. 6 East. 388. 1 Law of N. P. abq. 9. 13. 5 T. R. 361.

(But in Eng. I know, not why) the action is, in form, trespass vi &c. Esp. 645. 3 Wils. 18. 3 Burr. 1578. 2 T. R. 4. Pink 203. 240. Coups 55. 2 T. R. 476.

But where the D. has illegally entered the p. p.'s house, the p. p. may sue for breaking & entering his house, & for the debauching his daughter as aggravation - i.e. as a ground of consequential damages. Here the action is both in substance & form, trespass - the gist is the unlawful breaking & entering of the house. 2 T. R. 167. 8. 2 T. R. 1032. 117. 205. 642. 3 T. R. 292. 1 T. R. 136. 555. 2 Wils. 313. 3 T. R. 202.

But if an action of trespass is brought, a license to enter the house defeats it. In Eng. it must be pleaded, being a justification, as a bar to the action, but cannot be pleaded under the general issue. Not so in Can. 2 T. R. 166.

According to Judge Swift a license is no defence, in this case - for he says the subsequent wrong makes the D. trespasser ab initio. 2 Sw. 64.

This opinion is clearly incorrect. If the license to enter was given by the law only, Sw. w<sup>d</sup> be correct. As in  
ta =

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king an Estray - entering, to distress - a traveller entering an Inn without permission & then committing a trespass.  
Perk. 191. 8 Co 146<sup>b</sup>. 4 Id. 96. 7. Esp. 383. 405. 2 Bl. 1. 12 18. 5 Bac. 161. 1 H. 4. 12.

It has been made a Qu. whether an action will lie vs me for taking away the p<sup>er</sup>son's child, without alleging loss of service, or other special damages? E.g. Trespass de filio rapt<sup>o</sup>. It seems it will lie, for the parent has an interest in the child, to provide for his education & humanity, policy &c all concur to give a remedy. 3 Bl. 130.  
Bro. 5. 770. H. N. 13. 90. 260. 3 Com. 426. 3 Co 38<sup>b</sup>. 3 Burr. 1879. 80.

The authority of the Father ceases, when the child attains the age of 21. for he is then emancipated. 1 Bl. 453.

The mother as such, has no authority (during husb<sup>'s</sup> life) - when she corrects, she is supposed to do it with his assent, I suppose. This rule amounts to little, & only gives husb<sup>'s</sup> paramount authority. 1 Bl. 453.

### How far a parent is made liable, by the acts of his children.

1. He is liable for their torts (they being minors, & under his care) to the same extent as a master for the torts of his servants. & this on the ground that he is their master.

2. So, he is no otherwise liable on their contracts, than as a master is, for those of his servants. Except in the case of contracts, for necessaries.

Under our Stat. if a minor or servant, being allowed to contract for himself, by the parent &c. makes a contract, the parent &c. is bound. St. C. 293.

3. In certain cases under our Stat. the parent is obliged to pay fines inflicted on his infant children. as in case.



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case of Sabbath breaking - omitting to work on high-ways - neglecting military duty. St. C. 228. 370. 308. 347.

### Different kinds of Guardians - their rights & duties.

A Guardian, is a temporary parent - i.e. a person in loco parentis, during the wards minority. There is much confusion in the Books, on this subject. Hargraves notes on Litt. is the best treatise. 1 Bl. 460.

In Eng. the Guardian has the charge of both p. person & estate of the ward - i.e. both are under the care of some guardian - but the person may be under p. care of one guardian (as the Roman tutor) - the estate, under that of another - (as the curator.) 1 Bl. 460.

There are Guardians by C. L. by Stat. & by Custom.

I. There are 4 kinds at C. L. - 1<sup>st</sup> Guardianship in Chivalry. This was used only where an estate was holden by knight service & vested in an infant by descent. It was abolished in Eng. at the restoration & was never known to our law. Co L. 88. note 11. 2 Bl. 678. 77.

2<sup>d</sup> Guardianship by Nature, is exercised by a natural Guardian. Some Books mention this kind, as if confined to the father - some as if confined to parents. 3 Co 38. 6 Co 22. 6 3 Com. 415. 1 Bl. 461.

By the C. L. however, the Father, mother, or any other ancestor, may be Guardian by nature. The Fathers claims include all others. the mother is second &c. - And among more distant ancestors, if 2 have an equal claim (as if the infant is heir apparent to his paternal & maternal Grand-father

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father's priority in the possession of his person, seems to decide the preference. 3 Com. 415. 3 Co. 38<sup>a</sup>. Co. L. 88<sup>b</sup>. n. 12.

This kind extends to the person only - & not to the Estate - & continues till the ward is 21. Co. L. 88. n. 12.

It extends only to the heir apparent of the ancestor - not to the other children. It admits of two therefore whether in Eng. the daughter can be the subject of it - or the heir presumptive. 3 Co. 38<sup>b</sup>. Earth. 386. Co. L. 89<sup>a</sup>. 86<sup>b</sup>. n. 12.

In Con. all children are heirs apparent, & trust extends to both the person & Estate.

In Eng. the Father may supersede the claims of all other ancestors by appointing a testamentary guardian. (Co. L. 88<sup>b</sup>. n. 12. 89. n. 14.) by Stat. 12. Car. II.

If the Father was natural guardian (not as to any other ancestor) the person of the ward belonged to him in exclusion of the right of the guardian in chivalry. - Co. L. 88 n. 11, 12. 3 Co. 38<sup>b</sup>. 5 Mod. 223. Litt. §. 114. Moore 708. 3 Com. 415.

In Eng. indeed the parents are styled natural guardians of all their children. By this is meant, not that they are natural guardians at C. L. but so designated by the law of nature. When there is no one provided by positive law, the Chancellor in his discretion, settles the guardianship on the Father; & when he dies, upon the mother. Co. L. 88. n. 12.

3<sup>d</sup> Guardianship in Socage Springs (like that in Chivalry) from tenure, & takes place only when an infant under 14. is seized of land, derived by descent, & holden by socage tenure. 1 Bl. 461. 2. Co. L. 87<sup>a</sup>. 88. n. 13. 2 Mod. 176.



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It belongs to the nearest of the infants kindred, to whom the land cannot possibly descend. that there may be no temptation to an abuse of trust. 1 Bl. 461. 2.

Among claimants there is no distinction between the whole & half blood. If 2 or more kindred are in equal degree, priority of possession decides. except that among brothers & sisters (of half blood, I suppose) the eldest is preferred. & among lineal ancestors, males. Co L. 88. n. 13.

The Guardian may lease the wards estate till he is 14. & may maintain ejectment in his own name. 3 Com. 415. 2 Rol. 41. Crof. 98. 2 C. W. 122. 2 Bac. 683. 4.

This Guardianship extends to the person. to the socage estate. to incorp. heredit. & it seems to personal property. Because, it is said, the custody of the person draws after it that of every species of property. but this is on the supposition that there is no paramount Guardian. Co L. 87. 89. n. 13. 1 Rol. 40. Hutt. 17. 3 Com. 415. Vaugh. 186.

This trust is not assignable like that in Chivalry. for it was intended for the infants benefit. Co L. 90. n. 1. 88. n. 11. 89. n. 13. Plow. 293. Vaugh. 181. X F. N. B. 143.

At 14 the ward may enter. oust the Guardian. & occupy the land. (for at that age he may choose one.) The Guardian is then accountable for the profits &c. & is allowed his reasonable expens. Litt. 8. 123. 1 Bl. 461. 2. 2 Bac. 687.

He may be superseded by a testamentary Guardian. Co L. 89. n. 13.

4<sup>th</sup> Guardianship for nurture takes place only when there is no other Guardian. It extends to children who

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who are not heirs apparent - to their persons only - & terminates at 14 - cannot exist in Conn. 1 Bl. 461. 3 Com. 415. 3 Co. 38. Moore 738. Co L. 84. 88. note 12. 89. n. 13.

It is exercisable by the Father or mother only. Co L. 89. n. 13. 2 Atk 14.

It seems, it can never take place as to the heir apparent - for if there is a parent he or she is natural guardian in this case till 21. Co L. 89. n. 13. 2 Atk. 14. 1 Bl. 461.

II<sup>d</sup> By Stat. 12 Car II. a father, whether of age himself or not, may by will or deed with 2 witnesses, appoint a Guardian for any or all his children, who are infants & unmarried - even to infants in ventre sa mere. The appointment is either in possession or remainder. May continue till 21. or terminate before that age. This Guardianship extends to the person & all the estate. Co L. 89. n. 15. 1 Bl. 462. 1 P. W. 703. 2 Atk. 110. 2 Wils. 129. It supersedes all others.

This species of guardianship is not assignable for the father made the appointment, thro special confidence. 2 Com. 234. 3 Atk. 417. 2 Atk. 14.

As to Guardians by Stat. 4 & 5. Ch. & M. for females under 16. see Co L. 89. n. 14. 3 Co. 37. a. 3 Com. 417. 2 Bac. 675.

III<sup>d</sup> Guardians by Custom exist in different places in Eng. but they come not under the general law. Co L. 89. n. 16.

IV. Guardianships not enumerated by the old Co L. writers. 3 Com. 418. Co L. 87. 89. n. 16.

1<sup>st</sup> By election of the Infant. This takes place only when there is no other provided either by the Law or the Father. e.g. If he holds no lands by knight service, or by socage.



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tenure, he has no guardian in Shivalry or Socage - if above 14 he has no guardian by nurture. if not heir apparent he has no natural guardian. & may have no testamentary guardian.

This kind is of late origin. But it has been in use ever since the restoration (1660) & it seems before. Election is said to be frequently made before a judge on the circuit. Co. L. 87. 1 Bro. 375.

There is no prescribed form of electing in Eng. - Lord Baltimore when 18, named his Guardian. Co. L. 89. n. 16.

Age for choosing a Guardian is said to be 14 in Eng. yet it is also said that the choice may be either before 14 or after. Indeed it is said that before the restoration 12 Car. 2. the practice of choosing was almost confined to infants under 14, the C. L. suming a Guardian after that age in a great measure unnecessary. I conclude that no age is settled, but that the Judge may suffer the choice when he thinks proper. 1 Bl. 463. 490 Co. L. 89. n. 16.

2<sup>d</sup> Guardian by the appointment of the Chancellor was also unknown to the C. L. This species like the other is of modern date. It seems that the Ct. of Ch. has exercised this power since the year 1696. Gillb. Eq. R. 172. 1 Bro. P. C. 544.

The Chancellor never appoints however when the infant is otherwise provided with a proper guardian. In other cases the power of Ch. is discretionary & extends as well to the removal as to the appointment of Guardians - The Chancellor may remove even a testamentary

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Guardian. Co. L. 89. n. 16. 1 Bl. 463. 18. W. 703. Salk 44. 2. Ray. 480. 1096.  
2 Bac. 679. 4 Co. 126. 1 Bro. P. C. 544. 2 Mod. 177. 1 Eg. Ca. ab. 260. 8 Mod. 214. 7 H. 116.  
135. Re Ch. 106. 10 vs. 160.

So Ch. may appoint a temporary guardian - may com-  
 pel one to give security & make discretionary orders as to the  
 support of the infant, or as to his estate. No such authy in  
Con. n. Tidem. 2 Bac. 679.

3<sup>d</sup> By appointment of the Ecc<sup>l</sup>. Court. The Law as to the  
 power of this Ct. to appoint is not fully settled. It claims  
 the right of appointing for the personal Estate & the per-  
 son also, provided there is no other. This right as to the per-  
 son has always been denied. 3 Com. 418. 14 Vin. 176. 2 Ser.  
162. 2 Bac. 679. 3 H. 6. 384. Burr. 1496.

It is lately denied as to the personal Estate of the In-  
 fant, & holden that such Ct. can appoint ad litem only.  
3 Atk. 631. Co. L. 131 b. 132. a. b.

4<sup>th</sup> The last species unknown to the C. L. is Guardian  
ad litem. Specially appointed for a particular suit, when  
 an inf<sup>t</sup>. diff. (never for p<sup>er</sup> p<sup>er</sup>) has no Guardian. May be  
 appointed by any Ct. in which such infant is sued. Co. L. 89.  
n. 16. 135. 3 Bl. 427. 2 Ser. 136. 5 Co. 53 b. 2 Bac. 680.

(In Eng. can children, having no C. L. Guardian, c-  
 lect one at 14, when guardianship for nurture ceases if  
 the father is living; or how are they provided at C. L.? the father  
 I suppose continues natural guardian of them all, according  
 to the import of the term in Equity. & the Chancellor settles the  
 guardianship upon him, when necessary. Co. L. 89. n. 12. 14. 2 Bac. 679.  
2 Com. 231. 2. 2 Atk. 118. 124. 2 Atk. 14.



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Now, indeed by Stat. 12. Car. 2. guardianship in such cases, is given to the Father. Co. L. 89. n. 10.

Under our Law, there is no guardian in Chivalry - in Socage - by testament - by Customs - by appointment of Chis. or Ecc. Ct. - Of course, we have only 1. Natural Guardians. 2. By appointment of probate - 3. Id. tit. -

One or two pages of municipal regulations on the subject of Guardians, were omitted here; for which see Stat. C. - Root & Kirby -

In Eng. as in Conn. all Guardians (except in Chivalry) are compellable to account for the wards property in their hands. Co. L. 89. n. 9.

The usual remedy in Eng. is by a bill in Chis. - this proceeding is now extensively remedial than an action of account at law, in compelling disclosures under oath - the production of papers &c. - Tho the action of account will lie. 2 Com. 231. Co. L. 88. n. 9. 2 Bac. 679. 687. 1 Bl. 462.

It is not uncommon in Eng. for Chis. to compel them to account annually. Com. 1 Bl. supra.

The usual remedy in Conn. is by ~~way~~ action of account, which is nearly as remedial here, as a bill in Equity in Eng. St. Con. 36.

If the wards Estate is in danger from the Guardians "insufficiency", the latter, tho a parent, may be compell'd to account at any time, by Chis. in Eng. - By Ct. de Probate in Conn. 2 Com. 231. 2 Bac. 679. 2 Mod. 177. 1 Eq. C. at. 107. 260.

In case of misconduct by the Guardian, Chis. in Eng. may displace him - So if there is reasonable ground to

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apprehend misconduct, the Ct. may order him to procure security, & on refusal displace him. Indeed the Chancellor in such cases acts at his discretion, & makes such orders as he thinks proper. 2 Com. 233. 1 Eq. Ca. at. 26. & 261. 1 P. W. 702. 6. 2. Mod. 177. 2 Bac. 679. 1 Bl. 463. Salk 44. 2 P. W. 480. 1096. 1 Vern. 442. 17 Car. 2. 774. 126. 160.

No Guardians, except parents are bound at their own expense to maintain their wards - but may apply the wards Estate to his support. 1 Bro. Ch. 387. 2 Com. 230. 3 Atk. 399. 1 Vern. 255.

And the parent, when guardian, if not of ability, may so apply the wards estate - (not of common right, but by leave of the Chanc. in Eng. - Ct. of Probate here. 1 Bro. Ch. 387. 126. 160.

But a widow, having married again, is not bound to support her children by a former marriage - but may apply their Estate - otherwise the 2<sup>d</sup> hus. would virtually be burdened with their support. I think on principle the hus. is bound in this case, if the wife at the time of marriage was of sufficient ability - for why sh. this voluntary act of hers, alter their support? 1 Bro. Ch. 268. 126. 160. m. X 2 Vent 360.

It has been said, that for any thing more than necessary & ordinary expense in maintaining a child, the parent may apply the child's estate, if the object is for the child's benefit, & the expense reasonable. e.g. money advanced for the child's apprenticeship, to an useful trade. 2 Vent. 350. 2 Vern. 137. 255. 2 Com. 230.

This rule is denied by L<sup>d</sup> Hargrave in the case of apprenticeship, clerkship &c. But it sums every case.



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of the kind must stand on its own circumstances. The Chancellor, or Ct. of Probate here, gives permission or not, in his discretion. 2 Atk 399. 10 Am b. 136. 2 Com 200. 4. 1 Bac. 160.

(But if the Father pays for an extraordinary education, he cannot be repaid from the Childs Estate.)

In Conn. when the interest of an infant mortgages is decreed to be reconveyed, on a bill for redemption, the guardian is empowered by Stat. to make the reconveyance. & may be enjoined to do it, under a penalty. And if the infant has no Guard.<sup>n</sup> the guard.<sup>n</sup> ad litem appointed by the Ct. is authorized to reconvey. (In Eng. the infant may do it.). St. Con. 226. 4 Burr. 1794. 1 Bl. St. 575.

So by our Law, the guard.<sup>n</sup> of infant heirs of joint tenants or tenants in common, is empowered with the assistance of such persons as the Ct. of prob.<sup>c</sup> shall appoint, to make partition of the land. St. c. 437. 3 Burr. 1801.

It is said the Guard.<sup>n</sup> or prochein amy may bind the ward by equal partition in Eng. But I doubt if this is law, for the infant may do it. 2 Bac. 684. 2 Rd 256. 3 Burr. 1801.

If the wards creditor, on a compromise accepts from the guard.<sup>n</sup> less than is due, the ward not the guardian has the benefit of the discount. For the latter has no right to make a speculation for his own benefit, with y<sup>e</sup> wards estate. 2 Com. 200. 2 Bac. 687. 2 Ch. Ca. 245.

The Guard.<sup>n</sup> is considered in Chy. a trustee to the ward - or if a stranger tortiously enters on an infants land & takes the profits, he is compellable in Chy. to account as trustee or

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Guardian - or liable as a trespasser, at the election of, the infant. (Former is preferable.) 1 Atk. 489. 1 Vern. 436. 2 Com. 230. 2 Bac. 687. 1 Rol. 661. 2 Vern. 295. 342. 1 Eq. Ca. at. 280.

If one receives the profits of another's lands during the infancy of the latter, & for several years afterwards, he shall account in Chy. for the whole. 2 Bac. 687. 1 Eq. Ca. at. 280.

Guardian must allow interest for the wards money, in his hands, unless he shows that interest could not be obtained for it. (Judge River.) 2 Ves. 629.

It is the duty of the Guard<sup>n</sup>. having personal property of the wards, to pay debts, charged on the wards estate out of that property, & not with his own. 2 Com. 231. 1 Ch. ca. 156. 7.

And if the wards estate is in mortgage, the guard<sup>n</sup>. ought to apply the profits of the estate to the interest, (& the surplus, if any, to the debt.) 2 Com. 231. 20. W. 279.

A guard<sup>n</sup>. has no power to vest the wards money, in land. But if he does so (taking a deed in the wards name) the latter may, at full age, take either at his election - tho' if he takes the money, he is compellable in Chy. to reconvey the land. 2 Com. 231. 1 Vern. 435. 6.

But if he dies without making his election, his Exec<sup>r</sup>. shall have the money; his heir cannot claim the land. For the right of this election is personal & transmissible. Vern. 433. 435. 2 Com. 231.

In general, the guardian in accounting for the wards money, is obliged to pay only principal & interest. But if the money was directed to be appropriated in a particular way (as in funds) & the Guard<sup>n</sup>. has appropriated it



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it in another way, as in a gainful trade, the ward may have at his election the interest or the profits - for the former reason, that the Guard<sup>n</sup> may not speculate &c. 2 Com. 231. 2. 2 Vis. 029.

As to the marriage of Wards, the Chanc<sup>y</sup> in Eng. exercises an authority, never claimed by any of our Cts. They forbid marriages, without consent of the Guard<sup>n</sup>. - Even if the Guard<sup>n</sup> consents to an unequal match, he may disallow it, & punish at his discretion. He also punishes, as for contempt, those who assist in the marriage, after the prohibition. Talb. 58. 2 P.W. 111, 562. 100. 167.

So if there is only an apprehension of the wards being married to his disparagement, tho' with the guard<sup>n</sup>'s consent; the Chanc<sup>y</sup> will prohibit it, & secure the person of the ward, if necessary - & even enjoin the Guard<sup>n</sup> of the other party not to permit it. I think in extreme cases, this authority may be exercised, when either of the parents is Guard<sup>n</sup>. Talb. 58. 2 P.W. 112. 3 Atk 304.

According to usage in Com. guardians may bind wards as apprentices.

Guardianship of females is said to be determined by marriage - I doubt the rule, unless the husb<sup>d</sup> is of full age - in which case, he becomes virtually her guard<sup>n</sup>. (tho' the rule is not true, & converso, if the wife only is of full age). Guardianship of males is not so determined, i.e. quoad their property. I suppose, it w<sup>d</sup> seem inconsistent that a minor husb<sup>d</sup> sh<sup>d</sup> be his wife's guardian, when under a guardian himself.

100. 91. 160.

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Settlement of Infants. For the mode of acquiring settlement in Conn. see Stat. c. 391.

1<sup>st</sup> By Birth. The place where a child is first known to be, is *prima facie*, the place of his settlement, (the rebuttable.) 1 Bl. 362. Cartw. 433. Comb. 364. Salk. 485. 1 Ld. Ray. 567.

This is generally the place of a bastard's settlement in Eng. 1 Bl. 362. 2 459. Salk 427.

And in all cases, if neither father nor mother, has a settlement, the child is settled in the place where it is born - rebuttable as to legitimate children in Eng. all g. auths sup.

2<sup>nd</sup> By Parentage. The settlement of the Father or maintaining parent, is that of the child. In Eng. of legitimate children only - in Conn. of bastards also; bastards are settled with the mother. 1 Bl. 363. Salk 528. 2 Ld. Ray. 1473. 3 T. R. 114. Kirk. 202. Bur. G. C. 371. 2. 1 Sw. 169. 1 Root 155.

Settlements of this kind are called derivatives - those by birth - originals. 3 T. R. 116.

The settlement of legitimate infant children (not emancipated) regularly follows that of the parent. If the parent acquires a new one, it is immediately communicated to his infant children. 3 T. R. 114. 116. 4 H. 118. 3 Esp. 1. Stra. 438. 831. 8 T. R. 479. 2 Ld. Ray. 1473. Bur. G. C. 496. 4. 270. 538. Kirk. 202.

After the father's death, it regularly follows the mother. Bur. G. C. 49. 64. 372. Stra. 746. 2 Ld. Ray. 1473.

Except in Eng. where a widow having children marries a second husband - for he is not bound to support them. Tho if under 7. they go with her for nurture (acquire her settlement.) 2 Ld. Ray. 395. Salk 528. 470. 3 Salk. 259. Doug. g. n. 6. Mod 87.



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In Conn. a ward gains no settlement by living with his guard appointed by probate. 1 Root 131.2.

By the acquisition of a new settlement, the old one is lost - but in no other way. 1 Bl. 363. Salk 528.9. Bur Set. ca. 371.

An Infant may under some circumstances, gain a settlement of his own by commorance; & then his derivative settlement is lost. e.g. an infant apprentice in Eng. may gain one by living with his master - not so in Conn. 1 Bl. 364. 2. Ray. 567. 3 T.R. 116.356. 1 Root. 131.2.

This gaining a settlement works an emancipation - i.e. he is no longer a servant of his Father. 3 T.R. 356.

After a child is emancipated, i.e. after he ceases to be considered in law as belonging, in character of servant to the parents family, or as being under his care & government, he cannot take the benefit of a new settlement acquired by the latter, even tho he continues to live with the Father. 3 T.R. 116.355. Stra. 438.801. 1 Bur Set. ca. 270. 688.806. 8 T.R. 479. 1 Wils. 183. 1 Ea 51.526. 5 T.R. 583.

A child's emancipation is effected -

1. By full age. Bur. Set. ca. 270. 1 Wils. 183. 3 T.R. 356.
- 2 By marriage. Stra. 438.801. 5 T.R. 583. 3 T.R. 116. 1 Bur. Set. ca. 270.
3. By gaining a settlement of his own. e.g. an apprentice. 3 T.R. 356.
4. By contracting any relation inconsistent with his remaining in a subordinate station in his fathers family, i.e. under the care & government of the parent - as that of a Soldier - So is the law - But I do not see why, if he remains a short time & then ceases to be a Soldier, he sh<sup>d</sup> not again be under the control of the father. Bur. Set. ca. 638. 3 T.R. 114. 116.356. 6 T.R. 247. 8 T.R. 479. 1 Root - 92.2. 5 T.R. 583.

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Attaining full age, is not an emancipation if the party continues a member of his parents family. &c. I suppose continues as servant. But supposes he boards as a guest with his Father - 6 T. R. 252. 28 a & 276.

3.<sup>d</sup> By marriage. On marriage the husbands settlement is communicated to the wife - the law not permitting the separation of hus.<sup>d</sup> & wife. 1 B. L. 363. Str. 544. Bur. Sit. ca. 162. 371. Feltk 528. Kirk. 202.

If then a woman settled in A. marries a man settled in B. B. is the place of her settlement. & she ipso facto loses her maiden settlement. Bur. Sit. ca. 122. 370. Feltk 528. 9. 1 B. L. 363.

And it has been decided that if the hus.<sup>d</sup> has no settlement, hers is suspended during coverture. but revives on the husbands death - (not now consid.<sup>d</sup> Law.) The following is the production of a wag, on this rule -

"A woman having a Settlement,  
" Married a man with none,  
" The Question was, he being dead,  
" If that she had, was gone?  
" Doth Sir John Pratt her settlement,  
" Suspended did remain,  
" Leaving the husband but him dead,  
" It doth revive again."

Response by the Pensive judges -  
" Leaving the hus.<sup>d</sup> but him dead  
" It doth revive again."

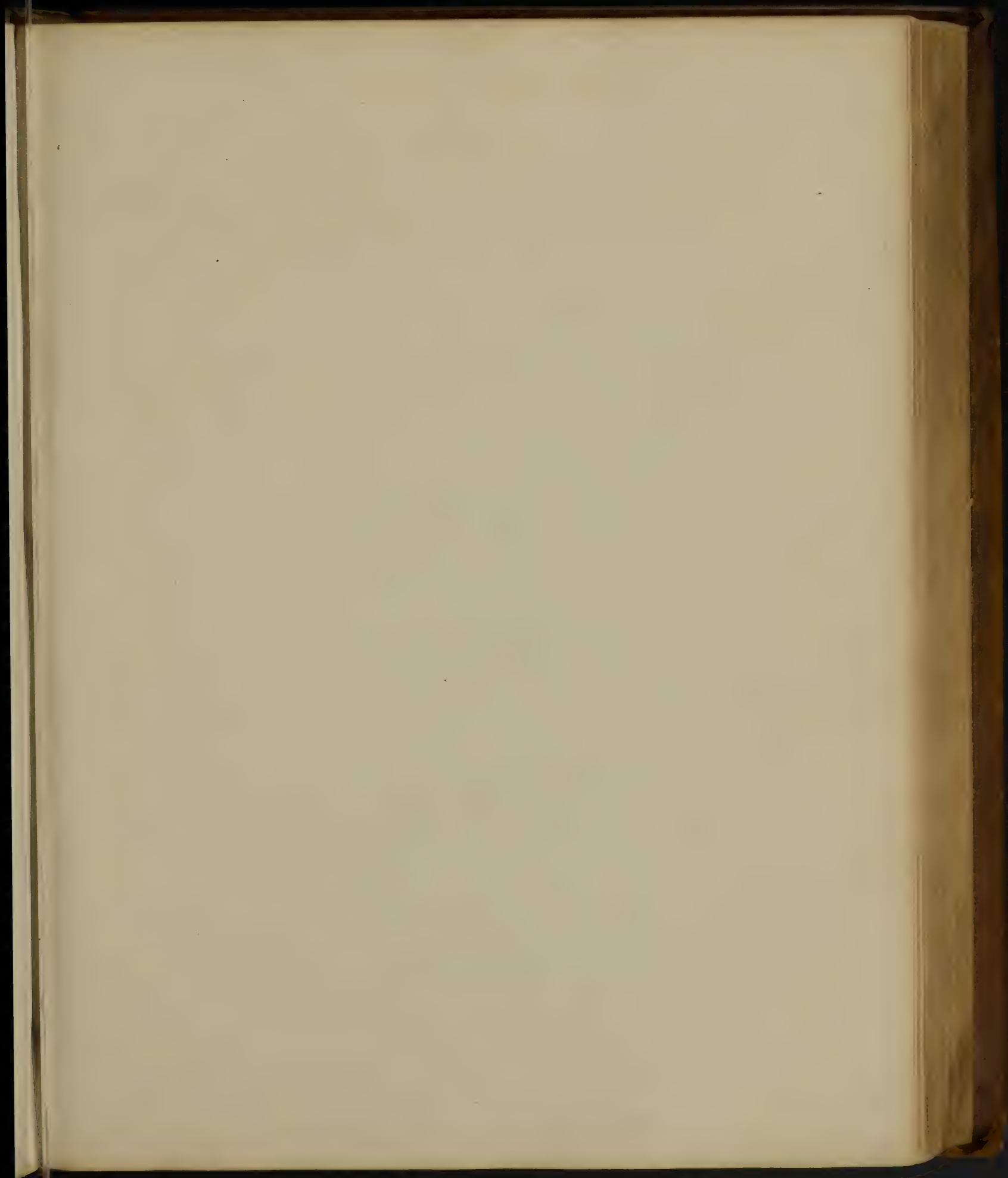
Bur. Sit. ca. 122. Str. 544. 683. Tool 232.



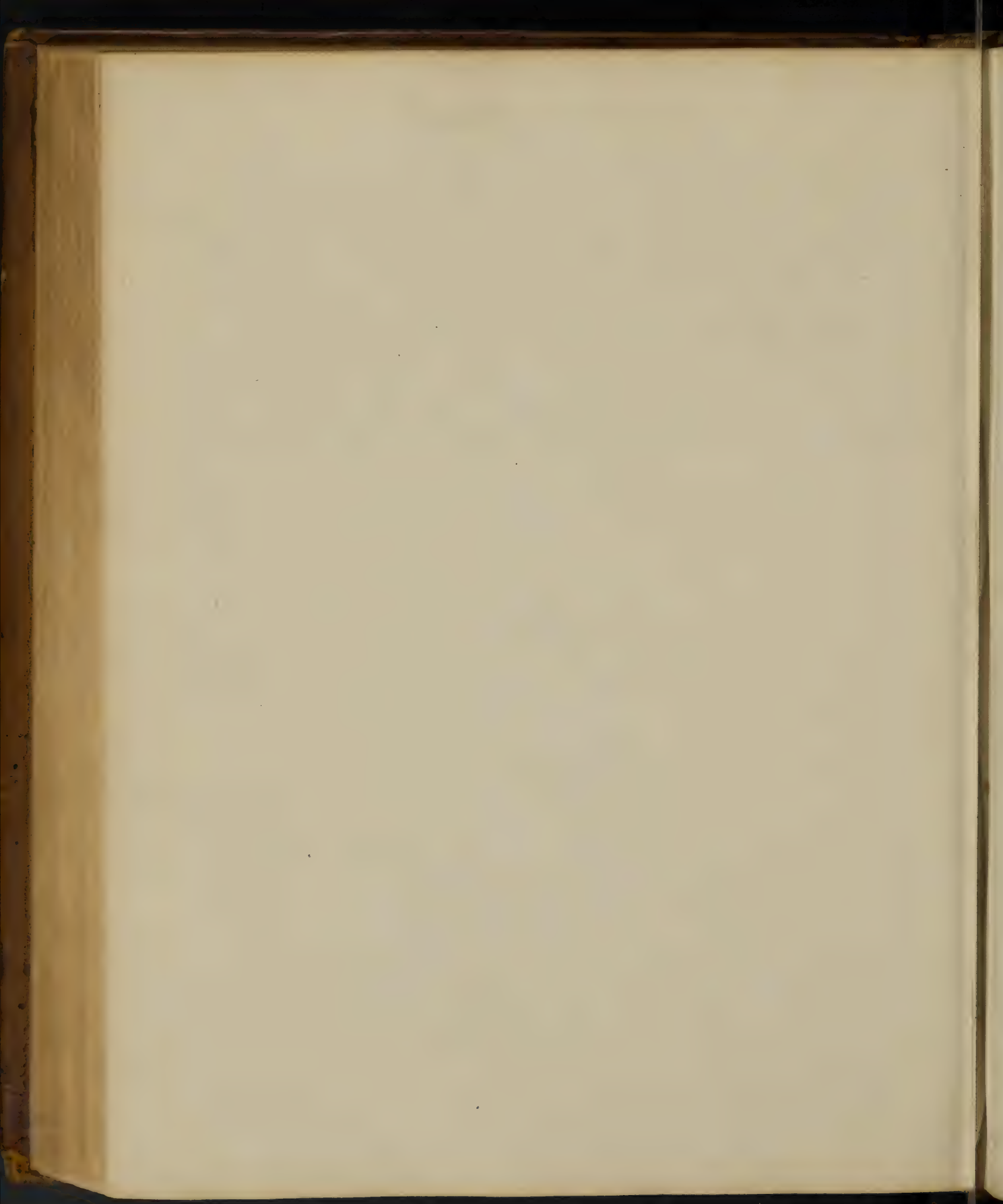
## Parent and Child.

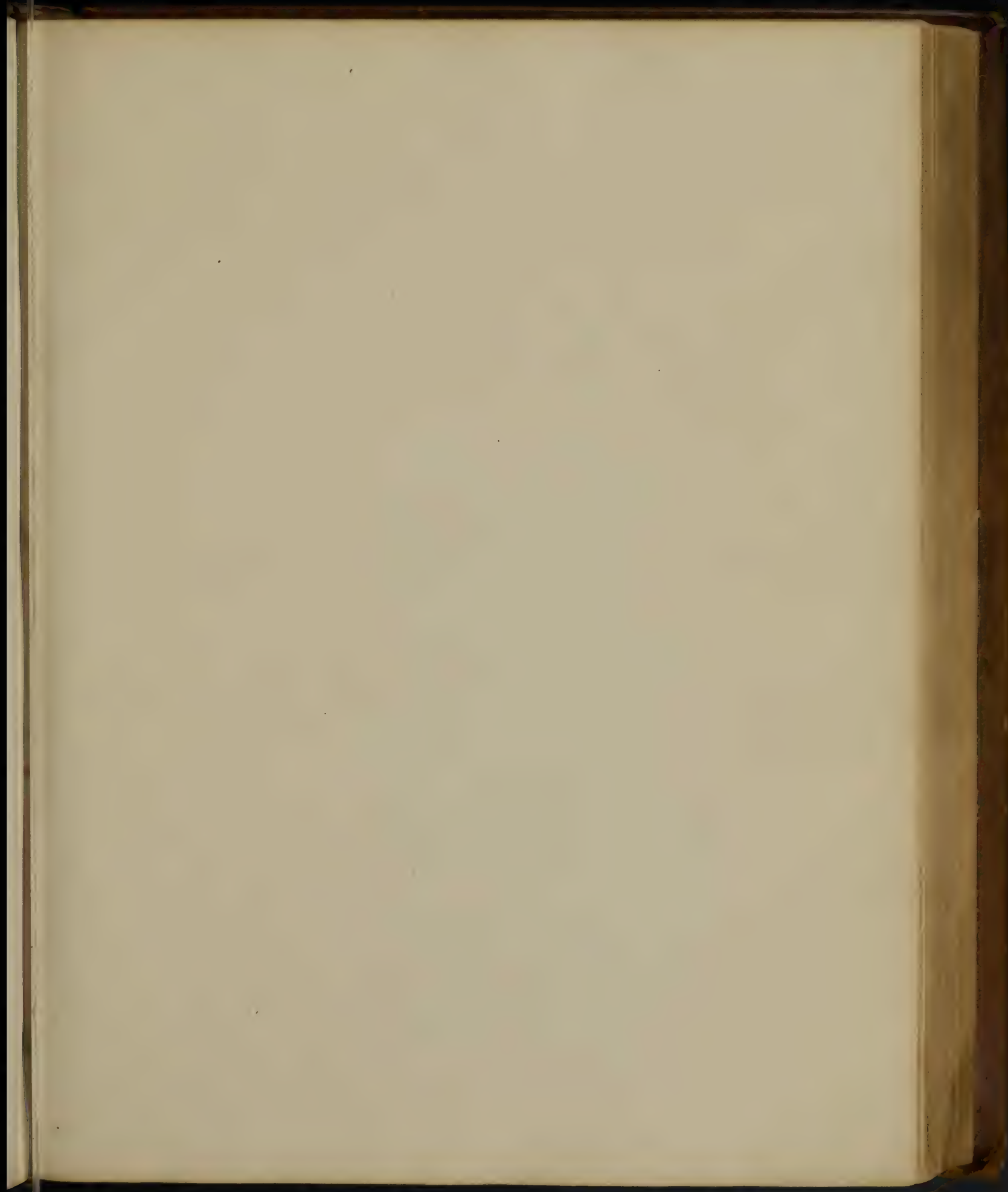
But it seems now established, that if the hus<sup>d</sup>. having no settlement, does not remain in the realm, or being in the realm does not remain with & support her, her maiden settlement continues. Indeed the Ct. hold that if he has no settlement, hers is not suspended. Bur. Lit. Co. 387. 122. 3<sup>rd</sup> 3<sup>rd</sup> 1. 3<sup>rd</sup>.

And in this case, her children by the marriage, are entitled with her, to her maiden settlement. Bur. Lit. Co. 387. 3<sup>rd</sup> 1. 2.

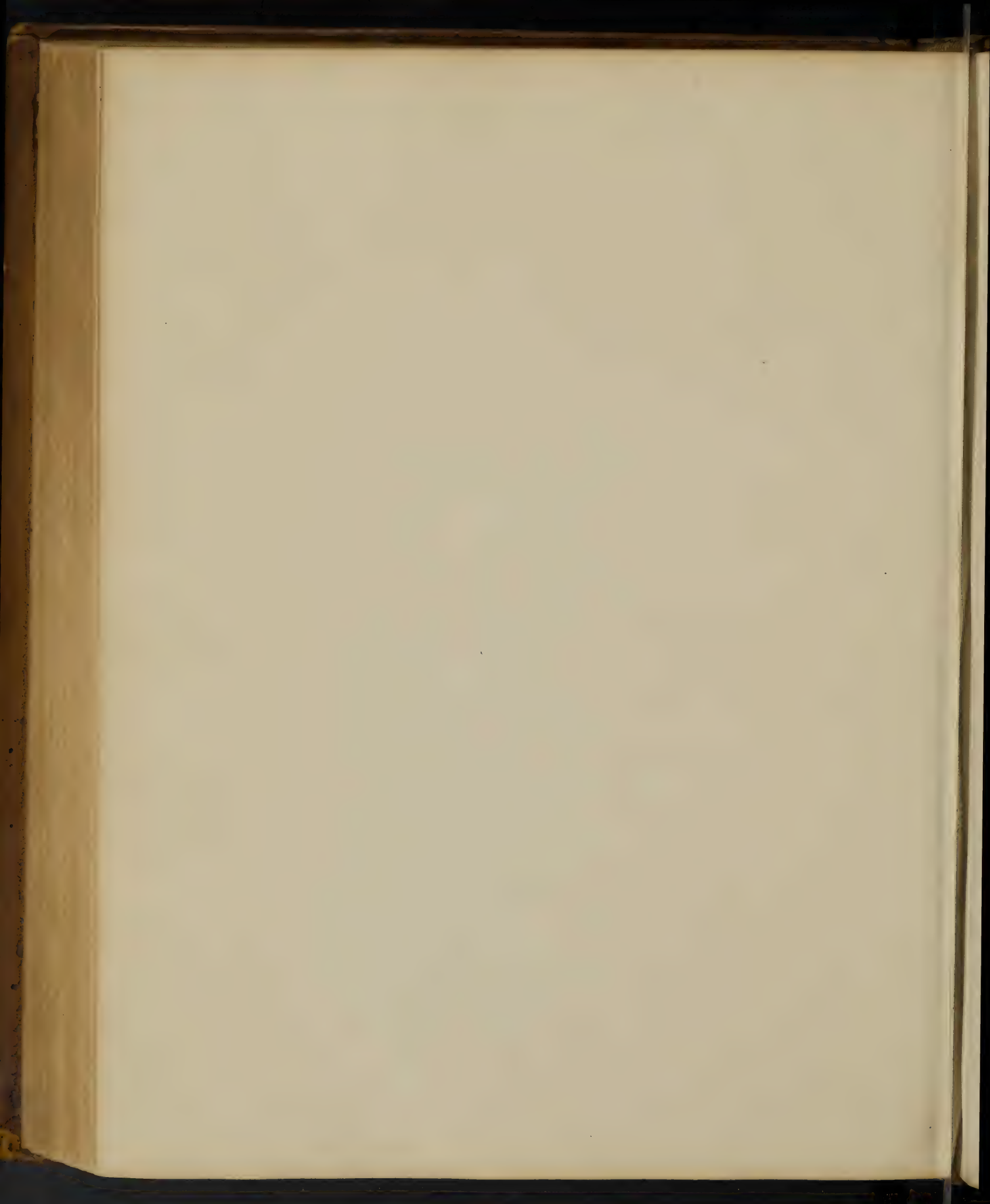


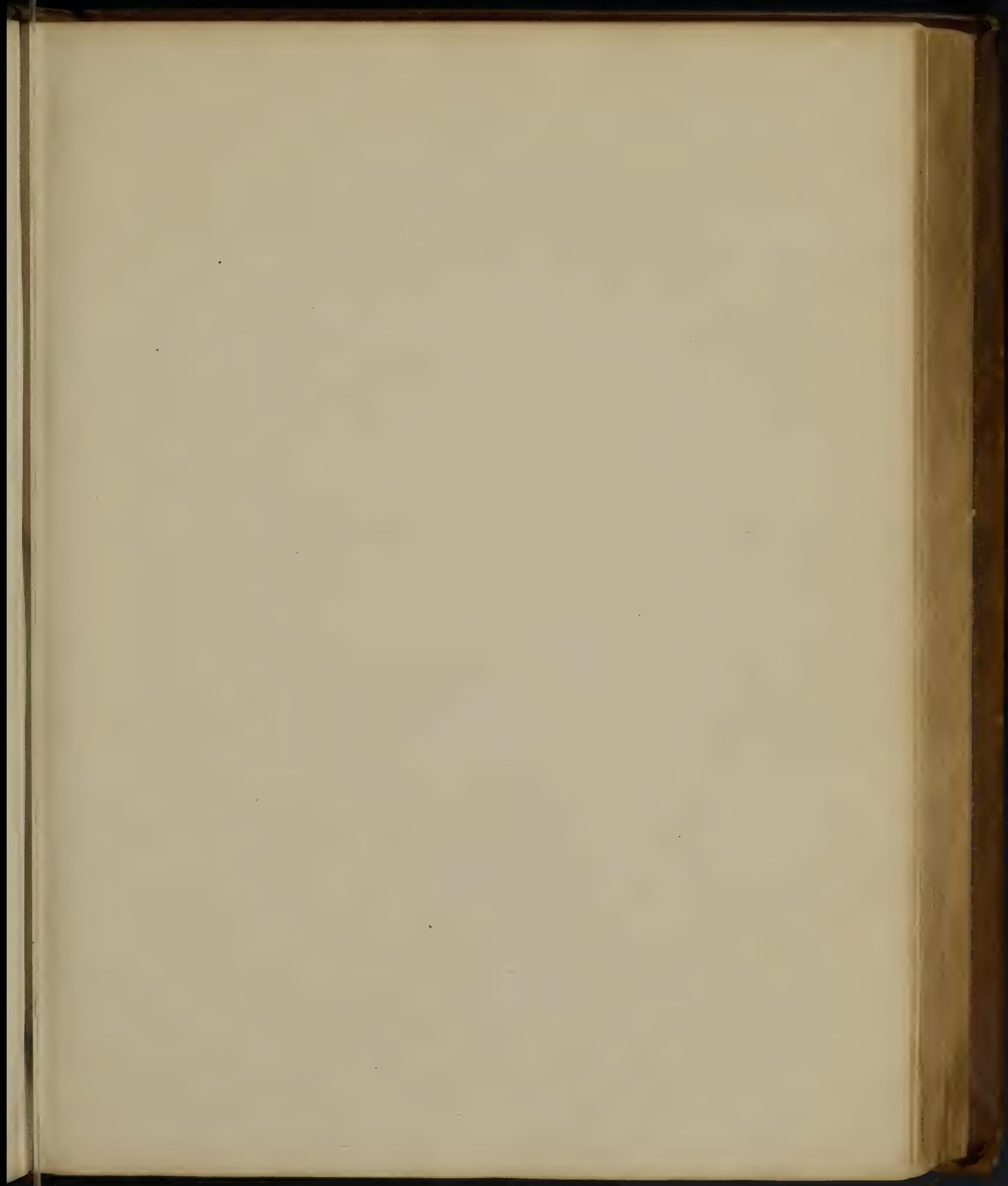




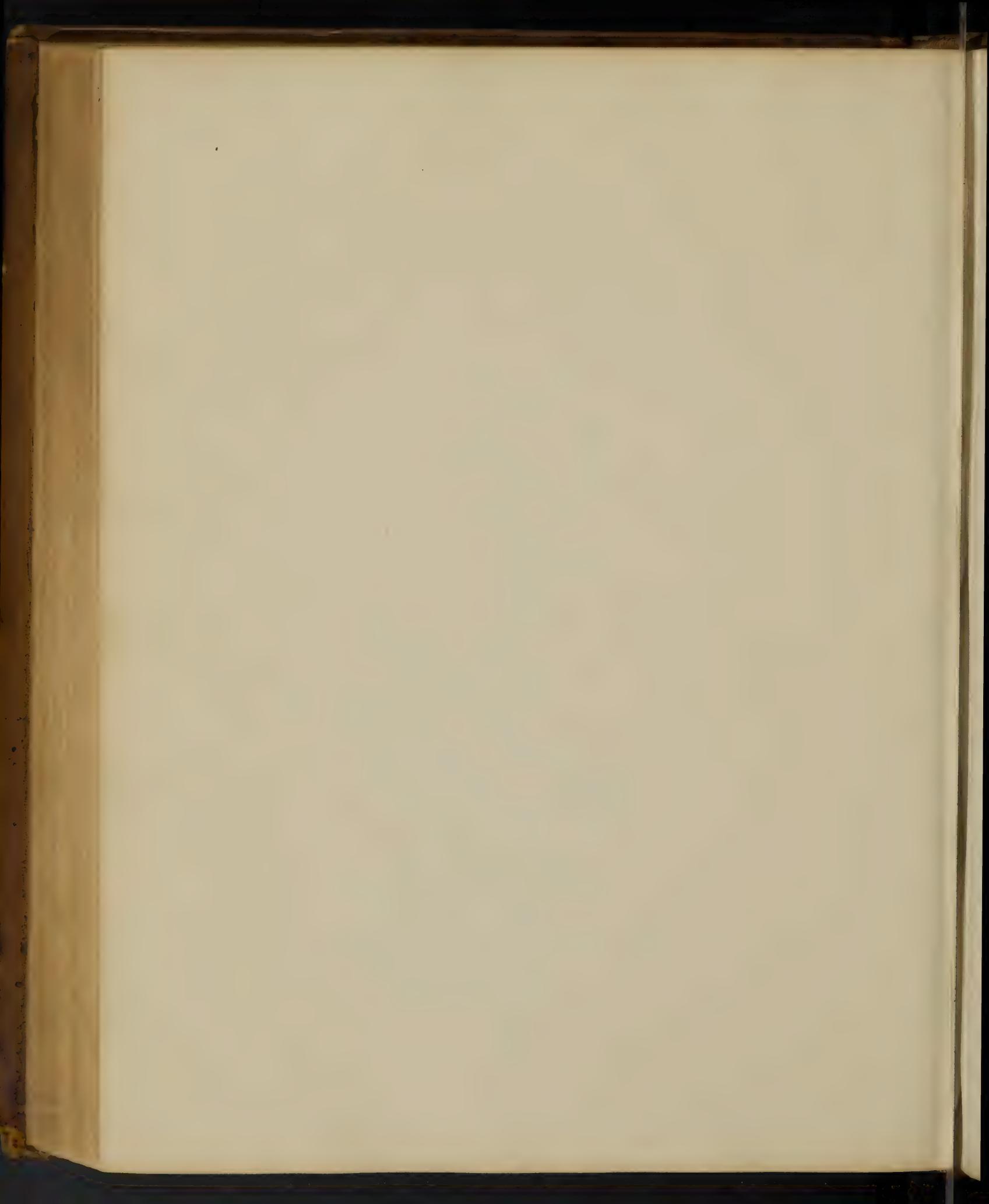


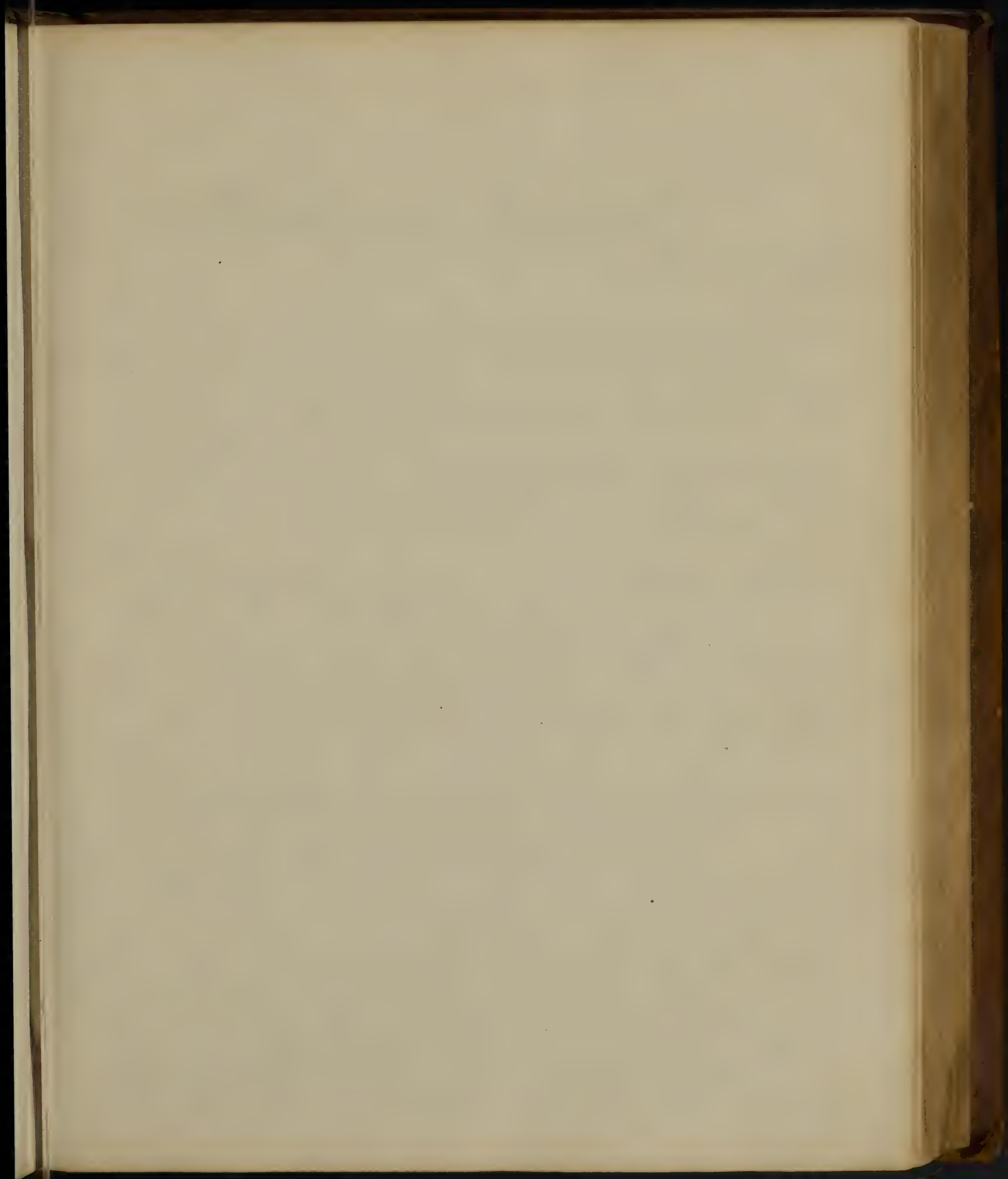




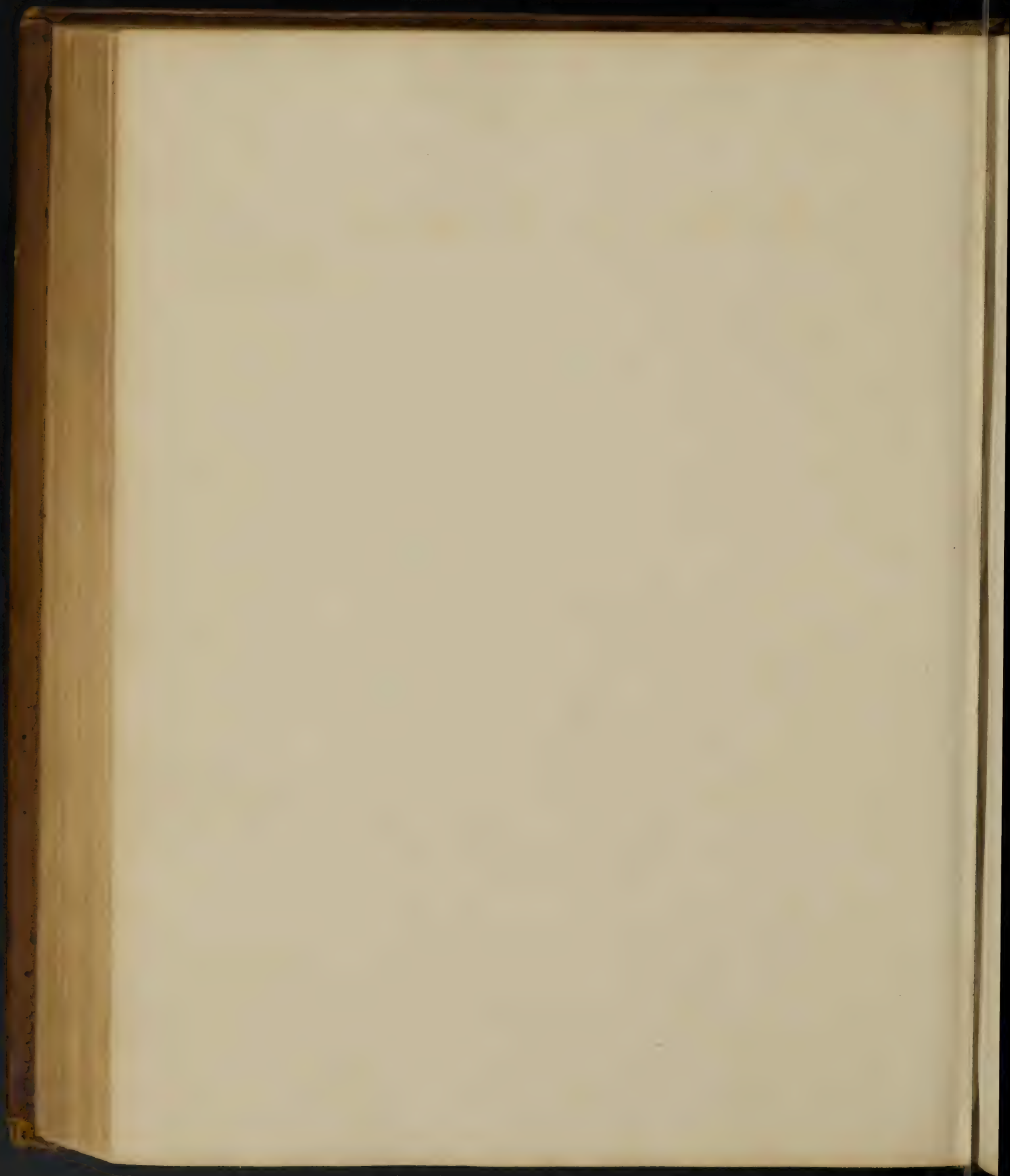












# Master and Servant.

By Mr. Gould.

A servant is one, who is subject to the personal authority of another. A Master is one, who exercises that authority.

The authority must be personal - for subjection to civil authority is not servitude.

The authority exercised by the Master, is generally by virtue of a compact with the servant, or his guardian - not always.

Kinds of Servants in Conn. are Six. Slaves. Apprentices. Menial Servants, <sup>Day Laborers</sup> agents of any kind, as factors, brokers, stewards, clerks, bailiffs, shipmasters, attorneys &c. Debtors assigned in service. 1 Bl. 423. 7. St. C. 34. Wood 464. 9.

The first & last of these kinds are unknown at C. S. 185. 423. 10. 1 Wood 468. 10. 1. 1 Salk 666.

I. Of Slaves. It is doubted by many whether Slaves have ever been legalized in Conn. - but it doubtless has been, so far as our municipal laws could legalize it.

If legitimate, Slavery exists here, it must depend on natural law - com. law or our own local laws.

First. According to natural law, Slavery, if authorized at all, must be by a state of captivity in war. by contract. or being born of a Slave, which Bl. calls a negative kind of birthright. 1 Bl. 423. 4. 1<sup>st</sup> By Captivity. It is said that the captor has a right to kill his captive, & therefore



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to enslave him.

But the right to hire exists only in case of necessity - in self-defence - & in case of actual capture, the captor cannot lie under this necessity. 1 Bl. 423. 7. Barlemaque 211. 219. Montoy.

2<sup>dly</sup> By Contract. This cannot be the foundation of strict slavery, which implies an absolute right over the property, liberty & life of the Slave.

A man has no right to dispose of his own life; & so he can confer no such right on another. Neither can he make an absolute sale of his liberty - for this w.<sup>d</sup> imply an obligation to obey even unlawful commands, & destroy free agency.

And as after such a contract he can have no right of property there can be no consideration for such a sale - no quid pro quo. But a contract to serve another is good - it is only a sale of his own labour. 1 Bl. 423. 4.

3<sup>dly</sup> By Sale. This presupposes the slavery of one's parent created in one of the last mentioned ways - & therefore the foundation built. 1 Bl. 424.

Second. The Com. Law clearly does not recognize any species of private slavery. Nor can the local laws of any country, in favor of slavery, be enforced in England. Salk 666. Soffe!

Indeed a foreign Slave, on landing in Eng.<sup>d</sup> becomes free - i.e. he is protected in the enjoyment of the rights of pers.<sup>n</sup> security, pers.<sup>n</sup> liberty & private property. Kent & Salk sup.<sup>a</sup> Salk 424. Co. L. 79. B. N.

There were indeed in Eng.<sup>d</sup> under the feudal system what

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what were called villains - but they were never absolute Slaves. The Lord had no right to kill or maim them. 2 Bl. 94. Sill. 5. 189. 194. 204.

But there are <sup>no</sup> villains in Eng<sup>d</sup> now. Villainage was virtually abolished by Stat. 12. Car. II. & even then it is not there, were but 2 villains in Eng<sup>d</sup>. 2 Bl. 8. 2 Bl. 96.

Indeed the character was hardly known there, in the reign of Elizabeth. Humis Eng. vol. 3. p. 307.

Third. By our Local Laws. To conceive a qualified Slavery is legalized. Judge Rains differs. We have indeed no express Stat. authorizing - but many recognizing & counting upon it. St. C. 14. 2 Bl. 337.

There has been an acquiescence of our Legislature, in the known practice of holding Slaves. We have indeed no judicial decision in point - but the Sup<sup>r</sup>. Ct. have several times manifested an opinion, that Slavery was legalized here.

It was decided by the Sup<sup>r</sup>. Ct. that a master cannot maintain Trover for his Slave - tho the Slave might be sold or taken in execution for his masters debt. Salk 666.

Decided also, that an action for taking away a Slave, must be the same, as for taking away an apprentice.

But strict absolute Slavery has never existed in Conn. For the master has clearly no power over the Slaves life, and it has been settled that a Slave may hold property, & sue for it by his next friend.

Decided by the Sup<sup>r</sup>. Ct. that the marriage of a Slave, with consent of the master, is an emancipation. 3 Bl. 206. 2 H. Bl. 511. 3 Bac. 547.



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A peice was not emancipated by marrying a villain - but no consent of the Lord is here supposed. 2 Bl. 93. 4. Litt. 8. 187.

But a villein was emancipated during coverture, if she married a free man - freer if she married her lord. Co. L. 122. a. n. 3. 136. 4. 136. 4. Litt. 8. 114.

Can an illegitimate child be a Slave by birth? In Com. by the civil law he may. for partus sequitur ventrem. Other wise in the Eng<sup>l</sup> law of villinage. 2 Bl. 93. 4. Litt. 8. 187. 8.

Slavery is now nearly abolished in Com. The importation of Slaves is prohibited. Children born of Slaves. Children born of Slaves after March 1. 1784 and before Aug. 1. 1797, are free at the age of 25. those born after Aug. 1. 1797, are free at 21. Importation of Slaves is also now prohibited by Stat. of U. S. Stat. C. 309. 462.

It is generally agreed, that offenders may be judicially condemned to Slavery for crimes - as e. g. in the Newgate & other penitentiary houses. This is a qualified civil Slavery to j. public.

11. Of Apprentices. So called from the word apprehendere (to learn) being generally bound for a term of years, to serve their masters, that they may receive instruction. Usually bound to the professors of some mechanical art - sometimes to husband & others. 1 Bl. 426.

They must be bound by Deed. a parol contract of apprenticeship is not binding at C. L. - Nor can a defective contract of apprenticeship be construed into an hiring by the year. being void - 6 Mod. 182. 2. Ray. 1117. Salk 68. 3 Bac. 546. 3 H. 304. 4 Com. 94. 2 Vern. 64. 492. 8 T. R. 379.

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It has also been said, that the relation of master & apprentice cannot be created, unless the latter is expressly retained by the name of apprentice in the deed. But this is denied to be law. 3 Bac. 546. 11 Burns Just 37. pt. 2. 8 T. R. 179. East 532. 4.

All other servants may be retained by parol. And those the law makes the distinction out of regard for apprentices as their servitude is so strict. 3 Bac. 546.

In Eng. the children of poor persons, paupers I suppose, may be apprenticed out by overseers with consent of 2 justices, one of full age, & those to whom they are offered are compellable to take. 11 Bl. 426.

A similar regulation in Conn. males till 21. females till 18. Stat. c. 60. 343. 122. 4. 552.

All servants are entitled to wages for their services apprentices however only by express contract. 8 T. R. 379.

The wages of menial servants are settled by contract. those of servants in husbandry, by the Stat. on Depositions. 2<sup>d</sup> pt. 47. 11 Bl. 428. In Conn. all servants wages are settled by contract.

By Stat. 5 Eliz. it is enacted that minors may bind themselves by indentures of apprenticeship. But (as the privilege of infancy is not entirely taken away) it has been uniformly holden, that the infant is not liable on the covenant, & that the only effect of the Stat. is, that while the relation actually continues, the parties respectively enjoy & rights & incur the duties resulting from that relation; & that the minor, if he serves the full time, shall be free of his trade. But if he deserts, master may not be retaken. nor can an action be maintained on the covenant. 3 Bac. 547. 4 Com. 94. 11 Bl. 426. Cro. C. 179. 448. Cro. J. 497. Doug. 501. 518. 8 Mod. 190. 5 T. R. 716.



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But if the Father or Guardian join in the indentures, he is bound by the covenant. So at C. D. he is liable for non performance of what is to be performed by y. app<sup>ce</sup>. Doug. 500. 1 W. 518. 8. Mod. 190.

No such Stat. in Con. as that of 5 Eliz. A minor here is no more bound by such contract, than by any deed.

Misuser is a good <sup>cause</sup> for an apprentices leaving his Master. Such condition is implied. 1. Hk. 518. 1 W. 426.

It is said an apprentice cannot be discharged otherwise than by deed i.e. when the discharge is by agreement of the parties. Because the obligation must be dissolved, eo legum<sup>is</sup> in quo legatur. 3 Bac 546. 2 W. 117. 2 Atk. 68. 5. Mod. 182. 8. T. 109. 110.

But cancelling or delivering up the indentures must discharge the apprentice for the deed no longer exists. Stra. 582.

And in the case, Seymour vs. Manville, our Sup. Ct. held that the master after having discharged the apprentice by deed, could not maintain an action vs. apprentice for a tort - for the master was guilty of a wrong, in making the agreement with the apprentice. (I conclude the Father might have maintained a suit vs. the master.) 1 Day 153. 3 W. 126. East 619. 630. Doug. 257. 2 W. 136. 574. 1 D. 688.

An apprentice may be discharged in Con. by C. C. for default of the master - or punished for his misconduct. Same is done in Eng. by quarter Sessions, or 2 Justices. or by 1. but only in cases where the binding was by the auth<sup>y</sup> of Justices. St. C. 294. 1 W. 426. 3 Bac. 550. &c.

A master cannot at C. D. assign his apprentice, for the contract is fiduciary. This right is founded on a pers<sup>on</sup>.

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trust, not transferable. Different by the custom of London.  
3. Bac. 556. 1 Keb. 250. 12 Mod. 552. Hob. 134. 2 Bac. 555. 3 Keb. 519. Vaugh. 182.  
Doug. 69. Salk. 68.

An award of arbitrators that an apprentice shall be assigned, is void, unless it be by custom or consent of the apprentice. Stra. 1267.

But, tho' at L.S. the assignment of an apprentice does not pass his masters right or interest in him, it is good as a covenant or agreement to bind the assignee. & this, tho' the words are "grant assign," &c. words of a grant merely. The assignment is void as between the master & apprentice, not between the master & assignee. And if the apprentice serves under the assignment he may gain a settlement by it, in Eng. But he is not compellable to serve, nor can the assignee maintain any action on the original indenture.  
20. Kay. 683. Salk. 68. Doug. 69. 11 Wils. 96.

As the master cannot assign &c. so he is bound to keep him under his own care. He may not send him abroad, or to improve, unless by agreement, or the nature of the business requires it. 8 Mod. 286. 12 W. 446. 3 Bac. 555. Hob. 134. 5.

The Exec. of the master cannot hold the apprentice, for the masters right is not transmissible. 4 Com. 90. 2 Wils. 35. Salk. 68. Stra. 1267. 20. Kay. 683.

But it has been holden, that the Exec. is liable on the covenant to teach the apprentice, & is bound to procure him teaching. This rule has very justly been denied. for why sh<sup>d</sup>. the mast be bound to have a successor as teacher, more than & parent to furnish another apprentice in case this dies? 1 Lev. 177. 5 C. 1. Sid. 210. 2 Stra. 1267. Salk. 66. Wils. 2. part. 296.



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Whether the Master &c. is bound by the covenant to furnish diet clothes &c. to the apprentice has been a question according to the current of auth. he is liable. Suppose expenses &c. not named. 3 Bac. 556. 3 Bulst. 41. 1 Keb. 767. 820. 1 S. & 216. 4 Com. 96. Cro. 553. Day 30.

These auth. <sup>are</sup> sum. agreeable to principle, for as the master is to be furnished generally in consideration of services & as the Exec. has no right to the service he ought not to be liable for the necessaries. Tho' if a premium is given with the apprentice the Exec. ought to provide maintenance, & receive a proportional part. It wd. be better to express the conditions in the contract.

In Eng. Chy. has in some cases ordered part of the premium to be restored, on the masters dying soon after the apprenticeship commenced. & has even decreed a large sum, when a small one had been agreed upon by the parties. 1 Vern. 460. Finch. C. 396. Atk. 149.

So a master, on turning away an apprentice has been decreed in Chy. refunded a part. 2 Vern. 644.

So, also on the masters becoming a bankrupt, which dissolves the relation. It is denied that bankruptcy is per se a discharge, but said that the sessions will in such case discharge the apprentice. Atk. 149. 3 Bac. 550. Stra. 582.

And when Justices in Eng. discharge an apprentice, they may order the master to refund a part of the premium. not so in Corn. 3 Bac. 550. 1 Bl. 426. Sal. 67. 490. 11 Mod. 110.

Whatever an apprentice earns by his labor while the apprenticeship continues, belongs to the master. An app. & his wife will support &c. claims. Stra 582. Co. L. 117. 11 Mod. 415. 6 Mod. 69. 104. 48. 80. Sal. 68. 11 Mod. 69.

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Property of any kind thus earned by the apprentice, may be recovered by the master as his own, in any proper action.

And the rule holds, tho the labor, (for another,) is without the masters consent, & not in the line of the masters occupation. *Mes. 80. Stra. 582. 12 Mott 415. 6 H. 64. 3 Bac. 558. Salk. 87. Co. L. 117.*

The last rule does not hold it seems, in the case of other servants. There the master cannot recover servants wages. His proper remedy is an action on the case, for the loss of service, if the employer knew of the former retainer, or an action as the servant himself, for breach of contract. *3 Bac. 559. 567. Co. L. 117. Bro. 453. 2 K. C. 16. 264. 2 Lev. 53.*

If an apprentice, or any other servant, is enticed from the masters service, an action lies as the enticer. *3 Bac. 567. Coups. 56.*

And a journeyman is a servant within the rule. *Coups. 56. 1 Wood. 489. 2. 3 Vin. 20.*

For taking away ones servant with force, trespass lies for enticing him away, an action on case only. In *Coups.* the wrong was enticing, but the action is called trespass in the report. It was supported, but I do not see how. *100. 2 S. 111. 1117. Sal. 380. 3 Bac. 567. 2 T. 14. 167. 2 S. 111. 1002. Coups. 55. H. C. 240. 293. 4.*

An Eng. apprentice gain a settlement in the parish in which they serve the last 40 days by Stat.

III. Of Menial Servants. These are servants employed intra muros - domestics.

If the term of service is not fixed by the contract, the hiring is construed in Eng. to be for a year, upon the equitable principle, that the one shall serve, the other maintain thro the several seasons. No such rule in Con. *1 M. 425. Fe. 4. 155. 3 Bac. 546.*



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In Eng. by Stat. 5 Eliz. a servant in certain cases cannot leave his master - nor can the master dismiss the servant without either before or at the end of the term, without a quarters notice - unless allowed by a Justice. not so in Conn. 11 Bl. 425. 8.

IV. Of Day Laborers. No general rules, applicable, extend to these, except (in Eng.) by Stat. 5 Eliz. & 6 Geo. 1. - These provide that all persons having no visible effects, may be compelled to labor. Justices at the sessions to settle their wages. Penalties are to be inflicted on those who give or exact more. 11 Bl. 426. 7.

V. Of Agents, factors, brokers, &c. These are servants in relation to such acts, as affect the property of their employers. The principal has not the same general control over these, that a master has over a common servant. - He they are bound by Law, to act for him, according to their contract. 11 Bl. 427. 11 Wood. 489. 4 Com. 252. 207. 8.

It is difficult to lay down general rules as to rights & duties of this class of servants.

Every factor, broker, &c. ought strictly to pursue his commission for his own security. - then he is not liable for casual losses. - otherwise, he is. 11 Wood. 469. 4 Com. 227.

A factor may retain the goods of his principal in his hands to satisfy a general balance of account in his favor. But by giving up the possession to the principal, the Lien (which is inseparable from the possession) is lost; it is considered an abandonment. 4 Com. 254. 4 Com. 228. 11 Bur. 493. 1 East. 355. Esp. 584.

2 Bl. 1184. Esp. 2. 107. 1 East. 4. 2 Bl. 227. 523.

He has the same Lien on the price of the Goods, in the

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the hands of any person, to whom he has sold them. *Com. p. 251. 256.*

A Factor has no lien on the principals goods, until they come to his actual possession. Constructive possession as the delivery of a bill of lading, is not sufficient. They do not become a pledge, till actual delivery. *2000 117. 118. 109. 35. 6. 119.*

Rules as to factors lien, belong to *Ex. Mercat. 2. sup.*

If the Factor gives more, or buys less than his commission warrants, his principal may disclaim the purchase. & if he sells at a loss price, he himself, must bear the loss. *1 Com. 228. 160. 510.*

A Factor has no right to pawn the goods of his principal; & if he does, the principal may maintain trover as the pawnee, on tendering to the factor the balance due to him, without any tender to the pawnee. The factors lien is a personal right, which cannot be transferred. It admits of a *De. whether he might not pawn them for the principal. 5 T. R. 604. 5. 1 B. & C. 848. 4 Com. 227. Stra. 1178. 176. 102. 382.*

But he may sell the principals goods for merchandizing consists in buying & selling. & may sue & receive for the price in his own name. for he has a beneficial interest, viz. his commission. I think also, because general convenience requires it. The principal is perhaps in a distant country. *176. 102. 382. Com. p. 256. 107. 112. 2 Esp. 493. 7 T. R. 259. Bull. 130. Chit. pl. 5.*

So an Auctioneer (a species of Broker) may sue for goods sold in his own name, tho' they were known to belong to another. He like a factor, contracts in his own name. *176. 102. 382. 276. 501. 2.* So



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So a Ship Captain may sue in his own name for the freight. *causa supra*, Pick. 406.

In each of the preceding cases however, the action may be by the principal. *Chil. 22.5. 176. 182. 8. 178. 183. 50. n.a.*

An auctioneer is not liable for selling goods to the highest bidder, tho' for a less sum than the owner directed. The direction was unlawful, for the act of setting up goods for sale at auction, amounts to a contract with the bidders that the highest bidder sh<sup>d</sup> have them. But he is bound by instructions to set up the goods, in the first instance, at a particular price directed, as a house for \$100. or he must make up the deficiency. *Coop. 295.*

An Attorney also has a lien on the papers & judgment of his client, for his fees. & may direct the adverse party to pay the costs to him, & not to his client. If then he pays to the latter, the atty may compel him to pay over again. But this right is subject to the equitable claims of the adverse party upon the client. e.g. a set off for which claim he may retain the client's debt. *176. 181. 24. 122. 217. 507. 276. 440. 587. Doug. 100. 237. 276. 18. 82. 6. 45. 123. 67. 36. 45. 6. 87. 705. 71. East 464.*

An atty. who executes an instrument for another, sh<sup>d</sup> do it in his principal's name, not in his own. or he binds himself. *9 Co. 76. 1 Ro. C. 330. 501. 31 Jac. 408. 4 H. 140. Stra. 705. 2 Ray. 1418. 6. 7. 177. 178. 181. Chil. Bill. 24. 27. 56. 75. Stra. 955. 9 Co. 75. — The common form is "A.B. by C.D. his atty." — tho' no particular form is necessary. *2 East 142.**

An agent cannot bind his principal by deed without an authority for that purpose by deed or by the

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An agent for the public, contracting as such for the public, is not personally liable on his own contract. E.g. Ambassadors, & other public officers. So decided in Sup. Ct. of U. S. in case of Samuel Dexter, Secy. of War. 13 W. 172. 874. 14 W. 89. 1 East 582.

VI. Debtors assigns in service. This law was unknown to the C. S. The assignment is now very usual in Conn. For further particulars, see H. C. 34. Tit. 33.

## General Rules.

I. When the master is bound by, & can take advantage of, acts of the servant.

General principle. The acts of the servant, which are done by the master's command, express or implied, are in legal contemplation, the acts of the master. Irregular & misdeeds done by the servant in the performance of business, in which he is employed by the master, are deemed to be done by the master's command. *Qui facit per alium facit per se*. 1 B. 424. 4 Inst. 109. 2 H. B. 442.

So that whatever the servant does, by the express command of the master, whatever the master expressly permits him to do in the course of his business, whatever he does within the scope of an authority given him by the master, are the acts of the master.

A contract made with a servant, as servant (he being authorized to make it for the master) is made in legal contemplation by the master himself. E.g. If with a clerk of a counting house. 3 Mac. 554. Cont. 260. 2 H. C. 411.



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If a Servant is cheated of his masters property, the master may recover it by action, if the wrong doer. *11 Mod. 98. 6 Bro. 223. 3 Bac. 554.*

If the Servant is robbed of his masters goods in the absence of the latter, either the master, or Servant may have an action, (as the hundred in Eng.) for the injury. The Servant may sue, it is said, by reason of his own liability to the master. But for he is not liable generally, in case of robbery. The true reason is that the goods are considered as the Servants, as are all persons except the master. And further, there is frequent necessity for an immediate prosecution, if the master may be out of the way. *11 Mod. 105. 6 Bro. 265. 3 Bac. 59. 559. 1 Salk. 616. 3. 11 Mod. 289. 4. 11 Mod. 300. 12 H. 54. 11 H. 8.*

And in this case a recovery by either, bars the others action. And even the commencement of an action by one prevents the other from prosecuting civilly. *Salk. 177.*

When the Servant sues, he declares on a Rob<sup>y</sup> as of his own goods; which fortifies the reason that they are his, as are all except the master. *3 Bac. 60. 2 Salk. 374. 11 Mod. 289. Salk. 613. 4. 12.*

But if the Servant is robbed at supra, in the presence of the master, the latter only can sue - for in such case the taking is deemed to be from the person of the master. *Salk. 613. 11 H. 1. 1. 140. 1 Hawk. 148.*

If the masters money is gained from the Servant by an illegal contract, the master may recover it back by an action of *Indeb. ass.* But it is otherwise if the Servant squanders it, there being no fraud &c. - But if goods are so squandered, the master can recover from a bona fide purchaser; for the latter is bound to look into the Servants title.

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Goods can be identified - but money cannot. In this case where is no fraud, it is the same as if money <sup>of</sup> was gained from the master. 3 Bac. 559.

[If an Innkeeper's servant robs the guest, the master is bound to make restitution. This is a case sui generis, to prevent collision between master & servant, & to secure travellers. 1 Bl. 430. 1 Com. 210. 1 Vol. 2. 5 Co. 32. Dy. 266.

So if a servant of an Innkeeper sells bad wine, to the injury of the health of the guests, the master is liable to an action. 1 Bl. 430. 1 Vol. 95.

But the servant in this case, is said not to be liable, tho he knew the wine to be unhealthy. - because he acted as servant - but I doubt this. 3 Bac. 563. 1 Vol. 95. 2 Bac. 545. For the act is unlawful & wilful in the servant - & it is a general rule, that when any person has no power (i.e. right) to do a given act, whoever does it at his command, is a wrong doer, as well as the person commanding - & a servant is bound to obey only such commands of the master as are "honourable & lawful." 1 Wils. 328. 3 Bac. 562. 1 Bl. 430.

If then, the servant does an unlawful act, by the command of the master, both are liable, by a general rule of Law - as to principle, how? Why if I command my servant to beat A. he doing it, is liable, & why sh<sup>d</sup> he not be, if he does A. with bad liquors. 3 Bac. 563. 1 Bl. 430. Esp. 580. 588. 1 Wils. 328.

But it is said that if a servant in obedience to his master's command does a wrong act of which he himself is ignorant, he is not liable. - there being no culpable negligence in him - for he is but an involuntary instrument, & if the



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Master locks up in a Room, gives the Key to the servant, commanding not to let the door be opened, the latter is not liable for false imprisonment. 3 Bac. 562.

But I contend that the servant is liable, if the act is in itself, unlawful & accompanied with force; for in the former case a civil remedy being sought, the law does not regard the intent. - & the person committing the act is liable similarly for all the consequences. And in this latter case the intent is not consid<sup>d</sup>. Sufficient, that an injury has been committed. 2 Bl. R. 842. &c.

Those acts of the servant, which are not done by the masters command, express or implied, are regularly consid<sup>d</sup> as the acts of the master. - As where the servant acts without the masters direction, & not in the discharge of any authority or business, with which he was generally or specially entrusted by the master. The master is not liable for injuries thus occasioned to third persons, or upon contracts thus made. e.g. a servant leaves his work in the field, & commits a battery, or a clerk in his mercantile house, lurs land. Skin. 228. 3 Bac. 562. 3 Salk 282. 1 Bl. 431. 8 T. R. 533.

Upon this principle it has lately been decided, that if a servant while actually performing his masters business commits a wilful injury to another, & master is not liable e.g. driving the masters carriage wilfully at another. This was not done in furtherance or pursuance of the masters business & no command is implied. It is the same thing as if the servant had wantonly broken the glass

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others carrying, by casting a stone against it. 1 East 106.  
1 B. & C. 472. Salk 441. Skin. 228. 3 B. & C. 502. 3. 3 B. & C. 762. 2 H. 154. Co. 408.  
Esp. 003. Contra 11 Wood 465.

But if a servant in the performance of the master's business, commits an act injurious to a 3<sup>d</sup> person, thro negligence or want of skill, the master is liable. He must at his peril, employ careful & skilful servants, but he is not an insurer of their unruly passions. In the one case, the act is his, in the other not - e.g. throwing a carriage, *ut supra*, thro negligence. 6 B. & C. 125. 5 H. 648. 2 H. 136. 442. 1 East 106. 11 B. 431.

In the latter case, the injury is occasioned by an act done for the master, not so in the former case.

A Carters servant drove negligently at another's Cart, & killed a pipe of sack - the master was holden liable. So where one drove over a boy. Salk 441. 3 B. & C. 562. 2 Ray, 139. 11 Wood 465.

If a Surgeons apprentice injures a wound, thro negligence or ignorance, the master is liable. 3 B. & C. 560. 2 B. & C. 893.

So if a Blacksmiths servant, in shooting a horse, kills him thro negligence or want of skill. 1 B. & C. 431.

The distinction between wilful & negligent wrongs committed by servants has been but lately settled, as fully understood. And the history of the modern decisions upon the subject, is somewhat singular. 11 B. & C. 431.

In 5 B. & C. 175. a case, as to the master for the servants wilfully driving his carriage at the p<sup>l</sup>ffs. - It was holden that "trospass" was the proper action.

In 11 B. & C. this day was brought as to the master for servants negligently driving his carriage at the p<sup>l</sup>ffs. It was holden that



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that case was the proper action. 2 H. Bl. 442. 2 N. S. 446.

In East, Trespass was brought vs the master for servants wilfully driving his carriage, vs the plffs. Holden that no action w<sup>d</sup> lie vs the master. 1 East 106. 1 H. Bl. 472.

These decisions however are all correct. The trespass was not the proper action in the first cases.

For without doubt when the master is liable for even a forcible injury committed by his servant, without his actual direction, "case" is the proper action. The master is liable on the ground of negligence. tho the proper action vs the servant in such case is trespass. Doug 42. note 5th. for trespass.

If a servant employs in his masters business another servant, who by his negligence in performing it injures a stranger, the master is liable, as is also the last servant in most cases. So if the injury were done by one employed by the last servant. 1 H. Bl. 404. 6 T. R. 411. Doug. 600.

But in the last case an action lies only vs the immediate agent or the master. The intermediate servant is not liable, for he does not commit the injury, & is not the master of him who does. 6 T. R. 411.

In general (ultra supra) the master is not liable to the wilful torts of his servant. But it is otherwise, & concisely, when the wilful wrong amounts to the violation of a contract between the master & party injured. e.g. a servant to a blacksmith wilfully lames a horse in shoeing him - a Taylors servant wilfully destroys clock &c. For in these cases there is an implied promise by the master, that

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all necessary skill & care shall be used in performing the work. The master in such case is liable on contract. 176. 156. 158. 310. 160. 6. 2. 2. 910. 401. 513. 73. 4.

A Shff. is liable, civiliter for the torts & defaults of his deputies in the execution of their office. e.g. neglecting to execute legal process &c. So for arresting. &c. by mistake under a writ *no* B. &c. In this last case trespass lies v. the Shff., Doug. 42. 213. 16. 832. 310. 16. 209. 217. 154. Latoh 187. Went. 238.

And for mere neglect of duty, the Shff. only is liable, at C. D. - the under Shff. is not. (i.e. to the party aggrieved) For in such case the action is not for a breach of official duty only. and the deputy, not being a known public officer is not liable in his official character. In Conn. Shff. may have remedy vs Deputy. Esp. 603. Groe. 349. Comp. 408. Salk. 18. 441.

For positive torts, the under Shff. is liable. e.g. embezzling an execution - voluntary escape. In such case, he is not sued as an officer - but as a wrong doer. Salk. 18. Esp. 603.

Sheriffs are also liable for even the wilful torts of deputies, if they include a breach of official duty. e.g. embezzling, voluntary escape &c. Salk. 18. Esp. 603. Plak. 144.

In Conn. both are liable in all the above cases. if Deputy is here a known public officer.

A Postmaster is not liable for the defaults of his subordinate officers. for he has no hire. (i.e. from individuals) - makes no contracts with them - receives for the public public has the postage - he is a public servant - This is analogous to a servants employing a servant. 2. 2. 910. 646. Coalk. 487. Com. 1100. Cowp. 704. 704. Salk. 17. Esp. 614. 624.



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But a Post master is liable, for his own actual default. So is a Dep. P. M. 3 Bl. 642. Esp. 623 Com. 760. 2 Bl. 696.

And Indeb. ass. will lie v. him, for money illegally received to his own use. Com. 182.

The Master is bound by contracts made for him by the servant, whenever the latter in making the contract acts within the scope of an authority delegated to him by the master. In this case the act of the servant is the act of the master. The authority may be general or special. 3 Bl. 696 or implied. 2 Vern. 542. 642. Com. 450. 2 Bl. 224. 3 Bl. 234. 10. Mod. 109. 3 Bl. 757. 8 Bl. 531. Ch. 24. 7. 1 Bl. 457. 1 Show. 95. 5 Mod. 398.

A general authority to contract is one, which is not confined to any individual contract, but extends to all contracts generally, or to all of a certain kind. E.g. An employer a servant to purchase necessaries generally for his family or trust.

A special authority is confined to one or more individual specific transactions - as to buy a horse, or trust.

A general authority may be implied from the master's usual or frequent practices. 1 Bl. 430.

A special authority may also be implied, as if a master stands by, hears his servant contract for him & does not dissent. 1 Barn. 191. 2.

If the master has often sent the servant, for necessaries with money, & has permitted him to trade for him in no other way. He is not answerable for what the servant may afterwards take upon trust. There is no implied order to the seller to trust the servant.

## Master and Servant.

And implied order to the servant to trade on trust. 11 Bl. 430.  
3 Salk 234. 1 Show. 95.

And if a servant without any prior authority, general or special, buys goods for his master, which come to the latter's use, he is liable - for there is a subsequent agent. (So if a stranger instead of a servant, made the purchase.) Brownl. 64.  
3 Salk 234. Comb. 450. Chit. 26. 3 Kib. 625.

Suppose in the last case, that the servant had kept the money given him, & bought on trust - there being no prior authority in the servant to trade on trust - would not the master be liable, because the goods had come to his use? But is there any subsequent agent in this case? L. Ray. 224.  
3 Salk 234. 3 T. R. 760. 10. Mod. 110.

If the master has permitted his servant to trade on trust for him, he may in future discharge himself by forbidding the tradesman to trust &c. but not by orders known to himself, & the servant only - now (for a time) by a private dissolution of the relation - for it sh<sup>d</sup>. become notorious. And in all cases the prohibition or dissolution should be as public as the credit given by the master to the servant.  
Brownl. 64. Ca. in Law Eq. 110. Chit. 26. 25. 26. 760. 1. 10. Mod. 109. Parker 42. 154. 12. 110. 340.

The first prin-  
ciple is  
the first prin-  
ciple

② And when the servant acts within the scope of a general authority, even an express restriction not made public, & not known to the purchaser, will not exonerate the master. E.g. a servant at a Sivery Stable, sells a horse with a warranty. Here a general credit is given to the servant. 3 T. R. 761. 10. Mod. 109. 10. Thus if the servant were only a special agent - here no general credit is given. The above distinction applies to



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to contracts in general made by servants. *Idem*. 37 E. 261. 2.

If a servant in selling property which he is authorized by the master to sell, makes a warranty, the master is bound by it unless the authy. was expressly restrained. 4 H. 11. 2 H. 5. 2 H. 5. 508. 509. Salk 239. 100. 100. 109. Esp. 2. 630. Esp. 2. 111.

These principles make me doubt the case of *Southern v. Hawn*. for the servant was not expressly restrained from warranting; he willfully concealed the defects, which in law is a warranty. Cro. 469. 2 C. 2. 143. 2 C. 2. 143. 540. 2 H. 5. 526. 2 H. 5. 529. 532. 2 H. 5. 532.

I doubt also the rule, that if a servant sells an unsound horse at a fair, the master not having directed him to sell to any particular individual, no action lies vs the master. The point if he was directed is. I cannot see the least reason for this distinction. 1 Pol. 95. 2 Pol. 143. 3 H. 5. 540. 2 H. 5. 545.

According to the general rule, if a merchant sells goods for his master, & warrants them to be sound, the master is bound by the warranty. So in other similar cases. 2 Pol. 95. 1 Com. 168. 3 H. 5. 540. Salk 282. 2 H. 5. 540. 2 H. 5. 540.

The servant is regularly not liable on the contracts, which he makes for the master. But he may subject himself personally even in transacting the masters business, by an express agreement in his own name, as if he makes a warranty on his own credit. 3 H. 5. 540. 1 Pol. 95. 2 Pol. 95. 2 Pol. 95.

And undoubtedly if he makes in the masters name, a contract which he has no authy. to make, & by which his master is not bound, he must be personally liable in some form.

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form of action - On the "Contract," I conclude - or as the case may be for "fraud?" 1 Bos. & P. 128. 2 Burr. 127.

His wife, child, relation, or friend, acting for him, under general or special authority is his servant within the rule, which treat the acts of the servant as the acts of the master. The Con. & new rule on this subject. 1 Bl. 430. St. L. 240.

Master is not liable for expenses incurred by the ~~master~~ servants, & his wife. But is not the usage otherwise in Con. in the case of apprentices? 2 Esp. Cr. 739. 3 B. & P. 247. 1 Esp. 270. 1 Burr. St. L. 497.

### How far a Servant is liable for his acts & defaults to Strangers and his Master?

Those acts of the servant which are not done by the master's command, express or implied, are not in law the acts of the master - for these therefore the servant alone is answerable. In these cases he does not act as Servant? 1 Bl. 431. 3 Bac. 562. Stow. 224.

And this rule applies regularly to all cases, in which the servant's acts are not in the discharge of any business or authority with which the master has entrusted him - as in cases of willful torts of the Servant? 1 Bl. 430. 1 Esp. 603. Cowp. 406. Salk. 18. Cro. 2. 170.

There are other cases, in which strangers, injured by acts of the Servant, may have their remedy at the master, or the servant. The rule seems to be - That if the servant, in performance of his master's business, does an injury to another, thro' negligence, ignorance or want of skill, the servant himself (as well as the master) is liable to the party injured: provided the transaction, in which the servant was engaged for the master, was not founded on contract between the master,



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Stranger. e.g. a Servant negligently driving his masters carriage into another & breaks it - or vs one person. *Str.* 1080. 1664. 328. *Exp.* 580. 6. *S.T.R.* 411. 125. *T. Ray.* 220.

Secus, I conceive, if the transaction is founded on contract, *ut supra*. In such case the master only is liable to the party injured on the contract express or implied. For the act of the Servant being here the act of the master, the rights of the third persons are the same as if the injury had been done by the master himself, in which case there w<sup>d</sup> be a mere breach of contract - as in the case of a Blacksmiths Serv<sup>t</sup>. shoeing a horse & laming him - a Taylors Serv<sup>t</sup>. making a garment unskilfully &c. *1 Bl.* 431. *Comf.* 406. *Exp.* & *Salk.* 503. 586.

There is however an exception to the last rule. - For the Master of a Ship, as well as the owners, is liable to the freighters for damage occasioned by his neglect. - The freight-  
ing is strictly a matter of contract between the owners & freighters. But the master is considered an officer - besides the owners are frequently unknown. *Salk* 440. *Garth.* 58. *1 Vent.* 195. 238. *T. Ray.* 220. *S.T.R.* 125.

If a Servant commits a wilful tort, he is liable I conceive, in all cases to the party injured, even tho the transaction was founded on contract, *ut ante*. For the act is not in performance of the thing contracted to be done - is not in pursuance of the servants authority - is a distinct wrong. - If the master himself had done it, I think the owner might waive the contract, & sue him on his part. *1 East.* 106.

A public agent is not personally liable on his pub-  
lic

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lie contract. Upon this principle Indeb. ass<sup>t</sup>. for money had<sup>t</sup>. lies not vs an officer of the revenue for an overpayment. application must be made to the Govern<sup>t</sup>. Camp 64.

But this action will lie vs a public officer for money extorted or illegally received to his own use. as to that he acts for himself. & is a private wrong doer. Camp 182.

If an atty. knowing of & being witness to a release from A. to B. brings an action for A. vs B. he is not liable to B. for a vexatious lawsuit. it is said. for he acts as servant. 11 R. 95. 1 Mod. 209. 2 Bac. 595. 3 H. 563.

But where the atty. for a self. after a nonsuit. enters judgment for the deft. &c. he was holden liable to the deft. for fraud. Exp. 518. Watt 175.

The Servant is liable to the master for all wilful wrongs, & all negligence, by which the master is injured. as if a servant entrusted with the care of cattle of his master, suffers them to die for want of care. 3 Bac. 566. 11 Mod. 466.

If a merchants servant lands his masters goods for the duties are paid, & they become forfeited in consequence of the act, the servant is liable. 3 Bac. 564. Cro. 765. 10 Mod 107.

No action lies vs a servant for a bare breach of the masters orders, no damage being sustained. Correction is a sufficient id. so for ill manners. 3 Bac. 564. 1 S. 2. 298.

But if a servant disobeys or neglects to perform any lawful command of the master, & the latter in consequence of this disobedience sustains any damage an action lies. 3 Bac. 504. 1 S. 2. 298. 12 Ex. 133. 2 R. 6. 88. 11 Mod 268.

Rule is the same, where there is a neglect of duty



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the no express command: as in *Atty. neglecting his clients cause*.  
esp. 617. 2 *Loels* 325. 4 *Bac.* 2060.

The servant undertakes regularly only for diligence & fidelity: not for strength or skill. Hence in general he is not liable for his occasional accidents, as which ordinary diligence & fidelity are not a sufficient guard; as *Robbery* 1. 3 *Bac.* 564. 10 *Loels* 102. 4 *Co.* 84.

So the servant is liable over to the master, whenever the latter has been subjected to damages for injuries occasioned to 3<sup>d</sup> persons by the misconduct or negligence of the servant. *cases ante.*, 2 *Thun.* 1080. 10 *Loels* 159.

Thus rule however supposes the master not to have been actually a party to the wrong committed by the servant. If he was, he has no claim on the servant, for they are joint tortfeasors: as if the master commands the servant to commit a trespass, he is subjected for it. 3 *Thun.* 136. *Hard.* 164. *Hill.* 116.

See Servants' embezzling &c. see "Larceny" p.

## Masters authority over the Servant.

The master has a right to chastise his servant for any breach or neglect of duty as for disobedience, insolence, negligence &c. But the correction must be reasonable & be justified. 3 *Bac.* 566. 1 *Ed.* 175. 7. 1 *Bl.* 428. 1 *Haw.* 111. 130. *Co.* 6. 174. 2 *Thun.* 289. *Munt* 70. 2 *Hill.* 523. 2 *Loels* 167. 5 *Thun.* 120.

The first rule does not apply however to all servants. Those of the 5<sup>th</sup> class are generally not liable to correction: as factors, brokers, attorneys, shop masters &c. And it appears to me doubtful whether the right of correction extends to

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to any other than such as belong to the masters family. The right being substantially the same, as that of correcting ones children & supports the servant to be under the personal domestic government of the master.

The master undoubtedly has a right to chastise his slave, apprentice, or menial servant. & probably in some a debtor assigned to him in service. Du. as to day labours, unless members of his family.)

He may correct a slave or apprentice of any age. But if he beats any other servant of full age, he is not justified. & the servant may depart. 1 Bl. 428. T. R. 108.

So if the correction is by the masters wife.

Master cannot justify a wounding of his servant. for he must chastise moderately if at all. If then a servant sues the master for assault & battery & wounding, he can justify as to the ass't & baty. only, & sh<sup>d</sup> plead "not guilty" as to the wounding. Wounding is no where defined in Law. I conceive it must amount to a lacerating. 3 Bac. 566. 2 Mod 167. 8 W. 120. 218. 230.

By Stat. 4. ann. the master may plead double "not guilty" as to the whole. & a justification, moderate casting (as to part. 3 Bac. 567

The master must state in his justification the reason, the place where, & the business in which, he chose being matters issuable. 3 Bac. 566. 1 Sid. 177

Master cannot delegate his right of correction the authority being personal. A schoolmaster does not correct



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act a pupil by a derived power, but in his own right.

3 Bac. 567, 76, 70, 2 Callod 10, 2 Kay. 62, 310, Stra. 953, Cro. 330.

If the master in correcting the servant kills him, he is guilty of excusable homicide, manslaughter, or murder, according to the circumstances of the case. 3 Bac. 567, 1 Hawk. 454, 473, 4. Hawk. 11. Fost. 202, 2. 65, 5. Mod. 287.

A servant cannot avoid a deed obtained by duress of his master, he giving the deed the servant acts as a mere stranger. 1 Mod. 687, 2 Brownl 276, 3 Bac. 568.

### Masters remedy, as others, for injuries done to him, in relation to his servant.

An action lies in favor of the master as one who entices away his servant. It is laid with a *per quod*, because the only injury is servitium amissit. 3 Bac. 569, 567, Cro. 56, 6 Callod 187, 3 Vin. 70, 1 Wood. 469, Salk 380, 2 Kay. 1116.

If a servant is taken away with force, this pass with a *per quod* is a proper form of action. If no force there, it is strictly *case*. The trespass is not in *ing* or *egress* in *lat* in *case*. 2 Kay. 1032, 117, Salk 380, 17, 3 Bac. 567, 2 T. R. 167, Cro. 56, 404, 645, 3 Salk. 191, 2 Callod. 182, 289, 2 East 8, 13.

So if a servant without enticement leaves his master without license or just cause, & is retained by another knowing of the former retainer, action for loss of service lies to the latter. 3 Bac. 567, 809, 10, 106, 2 Vin. 63.

But an indictment lies not for enticing away a servant - it is a private injury only. 3 Bac. 567, Salk. 380, 3 H. 191, 2 Kay. 1116.

## Master and Servant.

If a Servant is beaten by a Stranger, he may have an action for the battery. If a loss of service is occasioned by it, the master may also have his action. The Servant is injured in his person, the master by loss of his labor. A recovery by one is no bar to the other action. Their rights & injuries are distinct. 3 Bac. 558. 9 Co. 112. 10th. 131. 2 Bul. 198. 1 Sid. 175.

The master in this case must declare with a *per quod* &c. & cannot recover if there has been no loss of service. 3 Bac. 558. Cro. 618. 2 K. 1. 682. 11 Co. 424. 5 Co. 113.

If one beats another's servant to such a degree that he dies, the master has in *quo* no remedy. The private injury is mended in the public. 3 Bac. 558. 4 Lev. 84. 90. 2 K. 1. 508. 2 Ray. 309.

If a Surgeon employed to cure a Servant's wound, intentionally injures it by improper treatment so that the master loses his service in consequence of the treatment, an action lies for the master v. the Surgeon. 3 Bac. 558. 2 Ray. 214. 2 Wils. 110. 1 K. 1. 98. 1 K. 1. 126. 2 Bul. 1. 332.

Suppose the injury done thro' negligence or want of skill. w<sup>d</sup> not the action lie for the master? - For the servant it would. Esp. 3. 601. 2 Ray. 214. 2 Wils. 359. 1 K. 1. 90.

In case of a Servant enticed away, or leaving his master without license &c. a recovery had & full satisfaction received by the master v. the Servant is a bar to a master's action v. the Stranger, who enticed or retained a Servant. For here is but one cause of action. 3 Bur. 1345. 1 B. 1. 187.

Query whether a recovery without satisfaction is a bar? 3 Burr. 1353. 4. Esp. 319. 4 Lev. 88. 5 Bac. 185. 4 H. 116.



## Master and Servant.

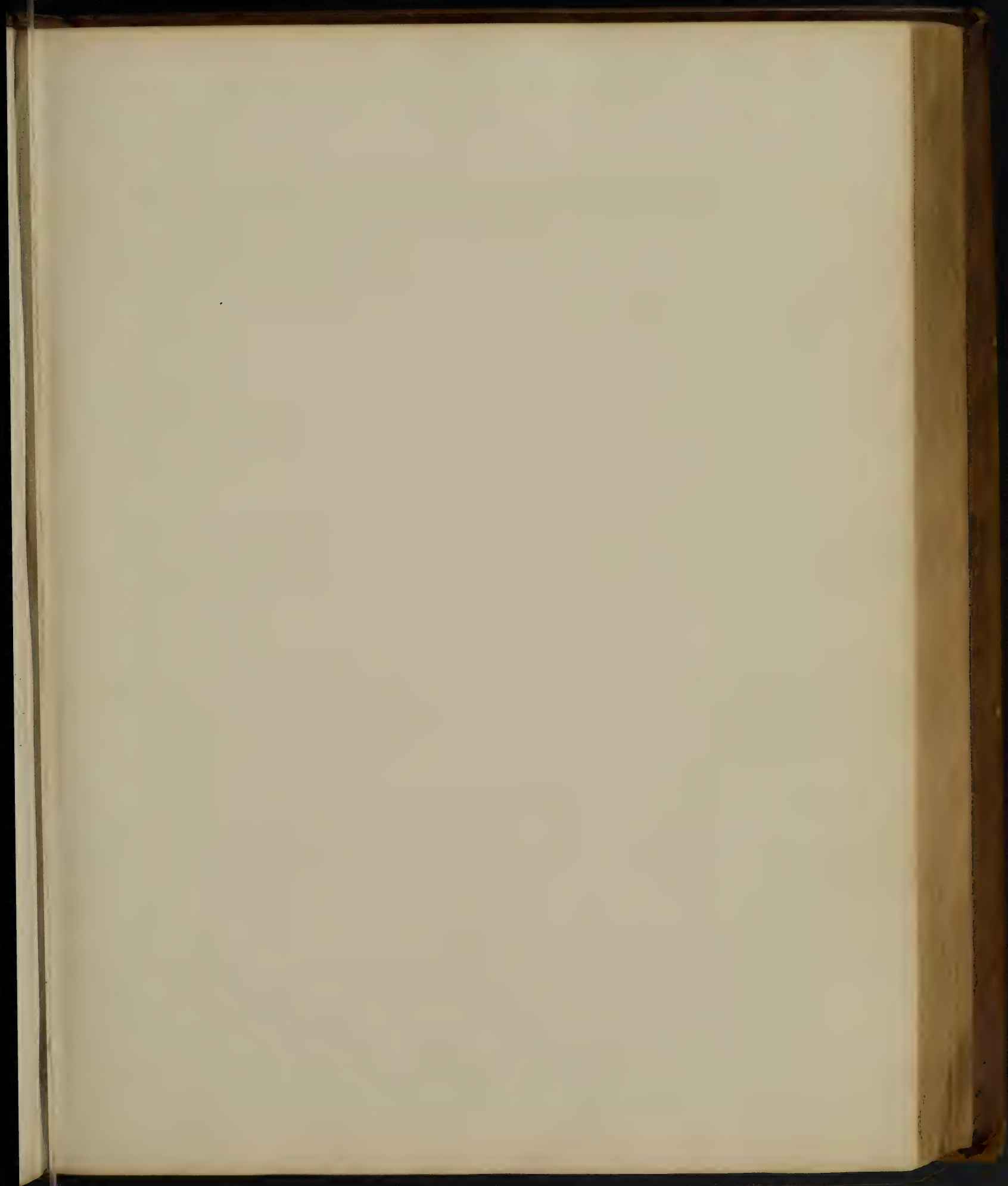
What acts the Master & Servant may  
justify in each others defence.

Master may maintain, i.e. abet & assist his servant  
in an action vs. a stranger, without incurring mainten-  
ance. 1 Bl. 429. 2 Rol. 115.

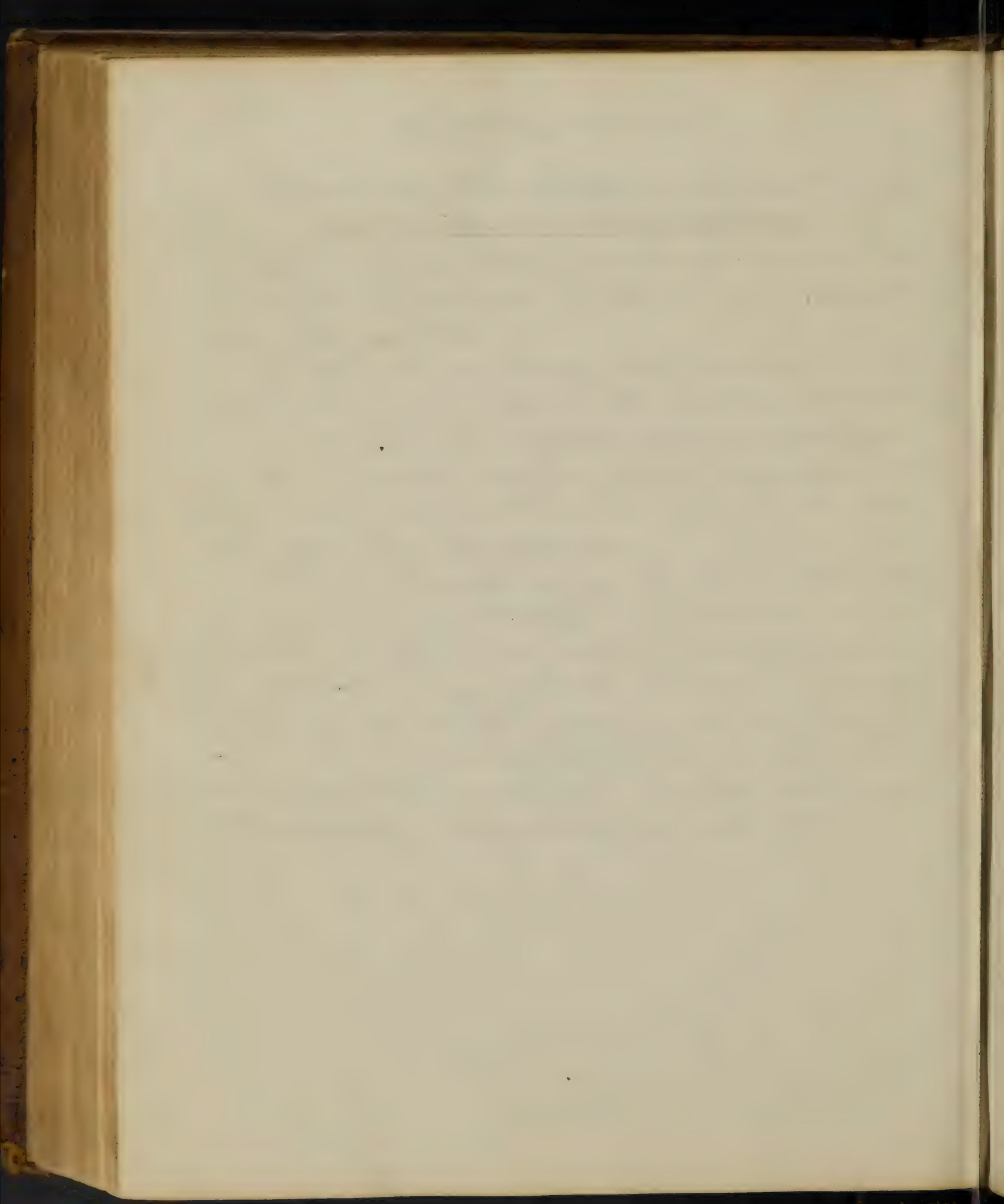
The Servant may clearly justify an assault in defence  
of his master, as far as the master might in defence of him-  
self, as it is part of his duty. 3 Bac 568. 1 Bl. 429. 2 Rol. 546. Salk. 407.

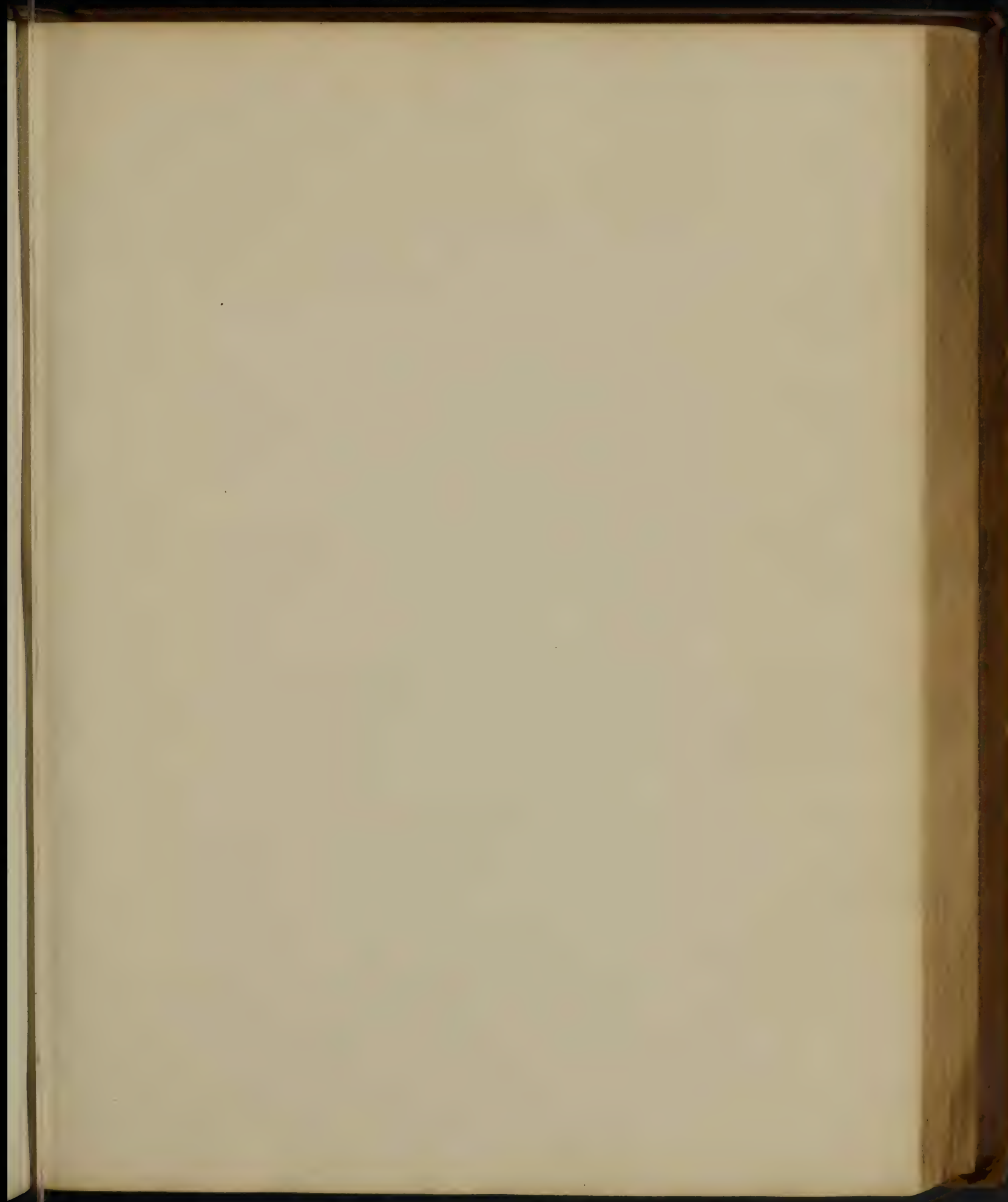
But he cannot in defence of his masters goods, or son,  
for he is not servant to the latter. The right grows out of  
the relation. 3 Bac. 568. 2 Salk. 1481.

Whether the master can justify an assault in defence  
of his servant, is questioned by some, because he may have  
an action for loss of service; so he may for injury done to  
his goods; but he may defend them, opinions are contradictory.  
But it seems the masters interest is sufficient to justify him -  
that it is his duty to protect his servant. So M. B. was de-  
cided in Moot Hall. see M. B. tip. 5. 3 Bac. 568. 2 Salk. 52.  
2 Rol. 546. Salk. 407. 1 Bl. 429. Saunders pl. 124. 5. 1 Haw. PC. 121.

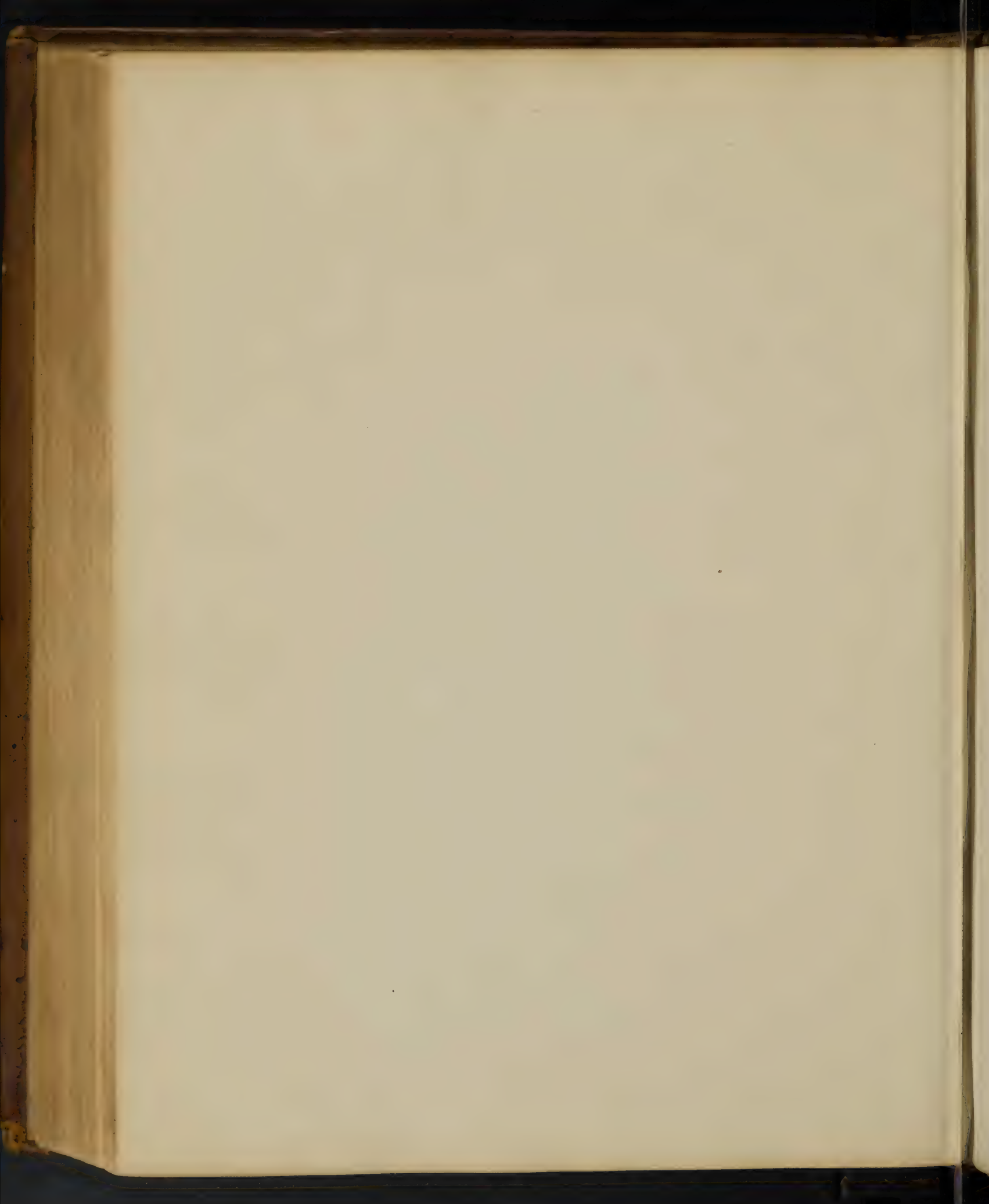


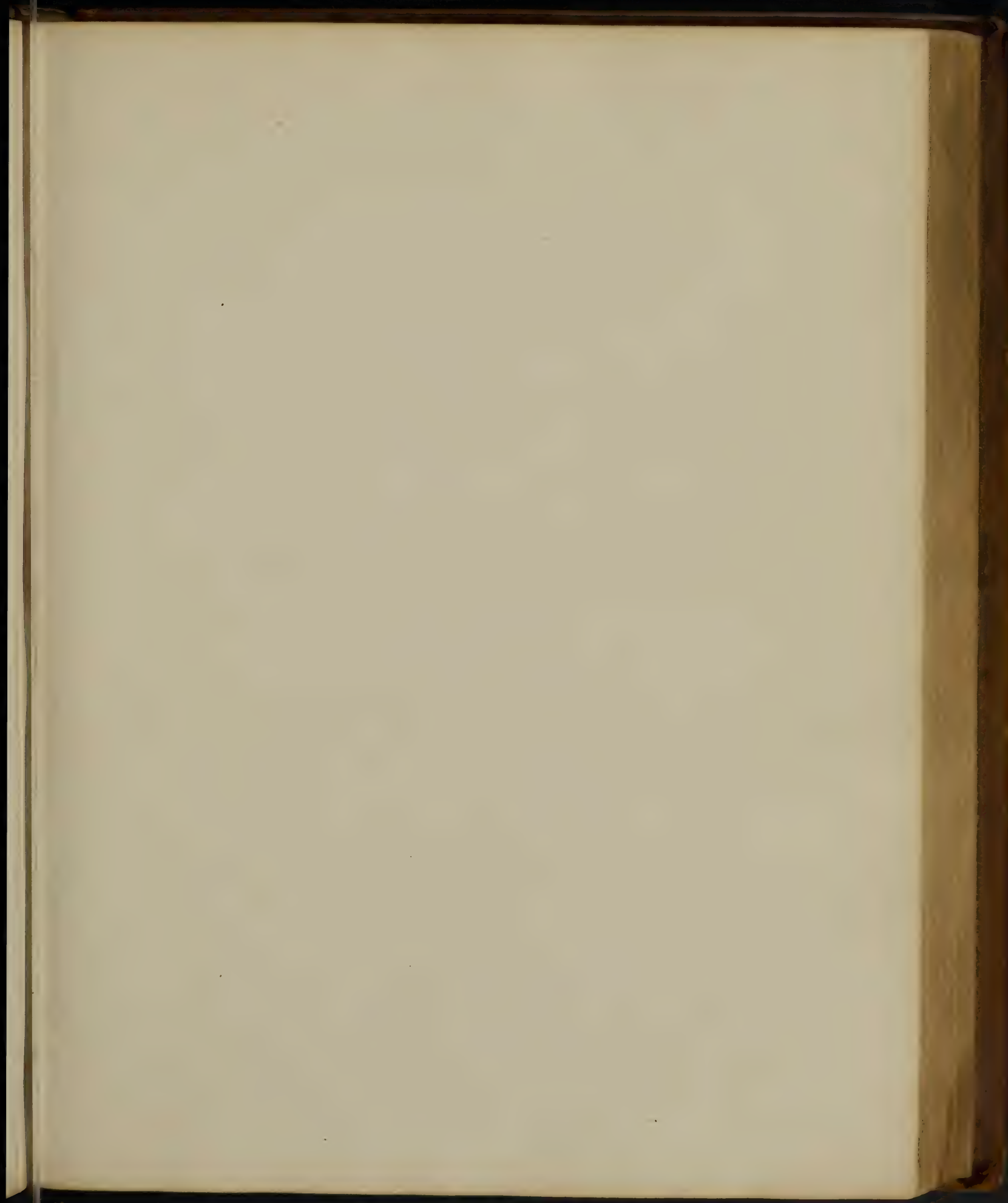




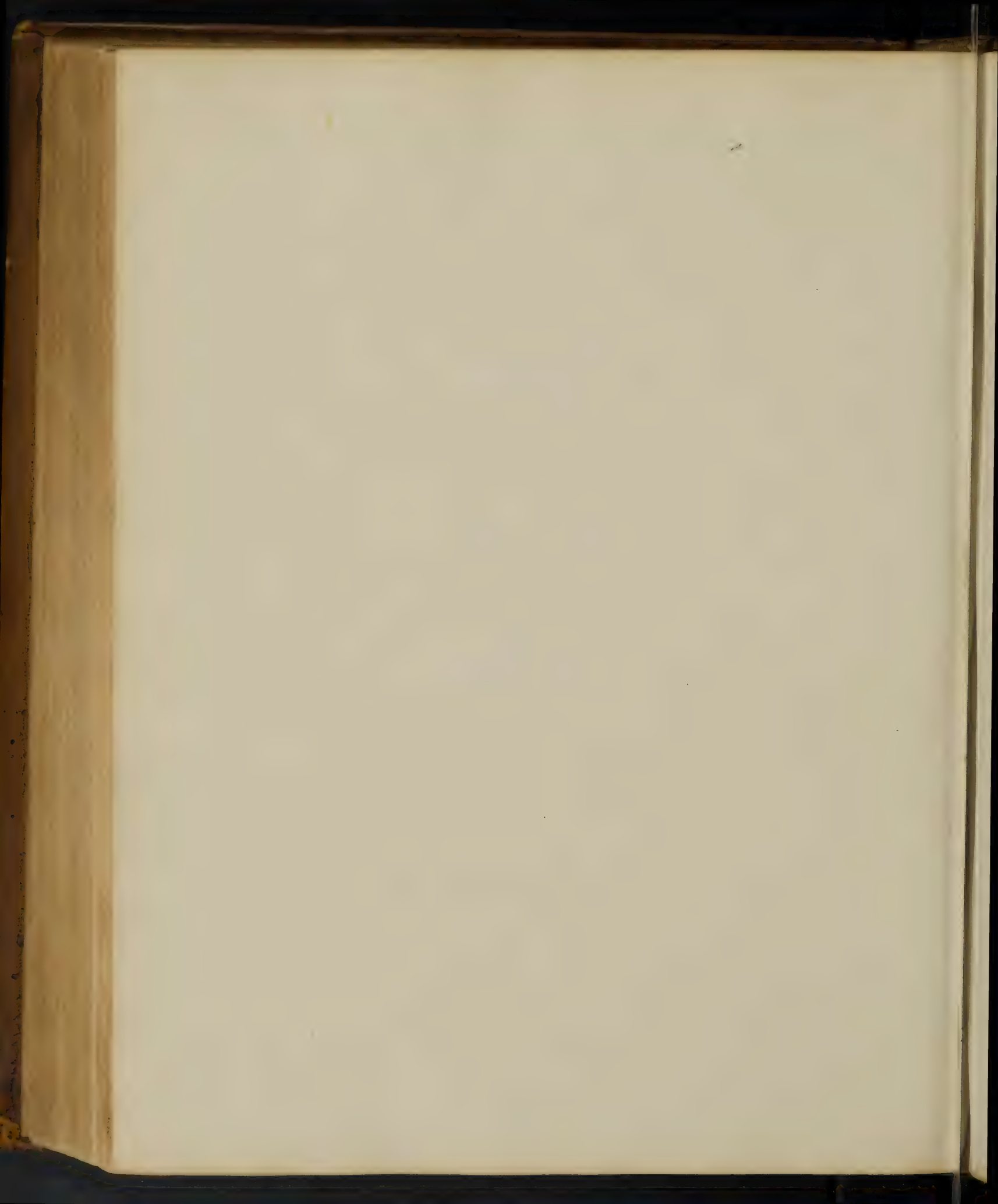


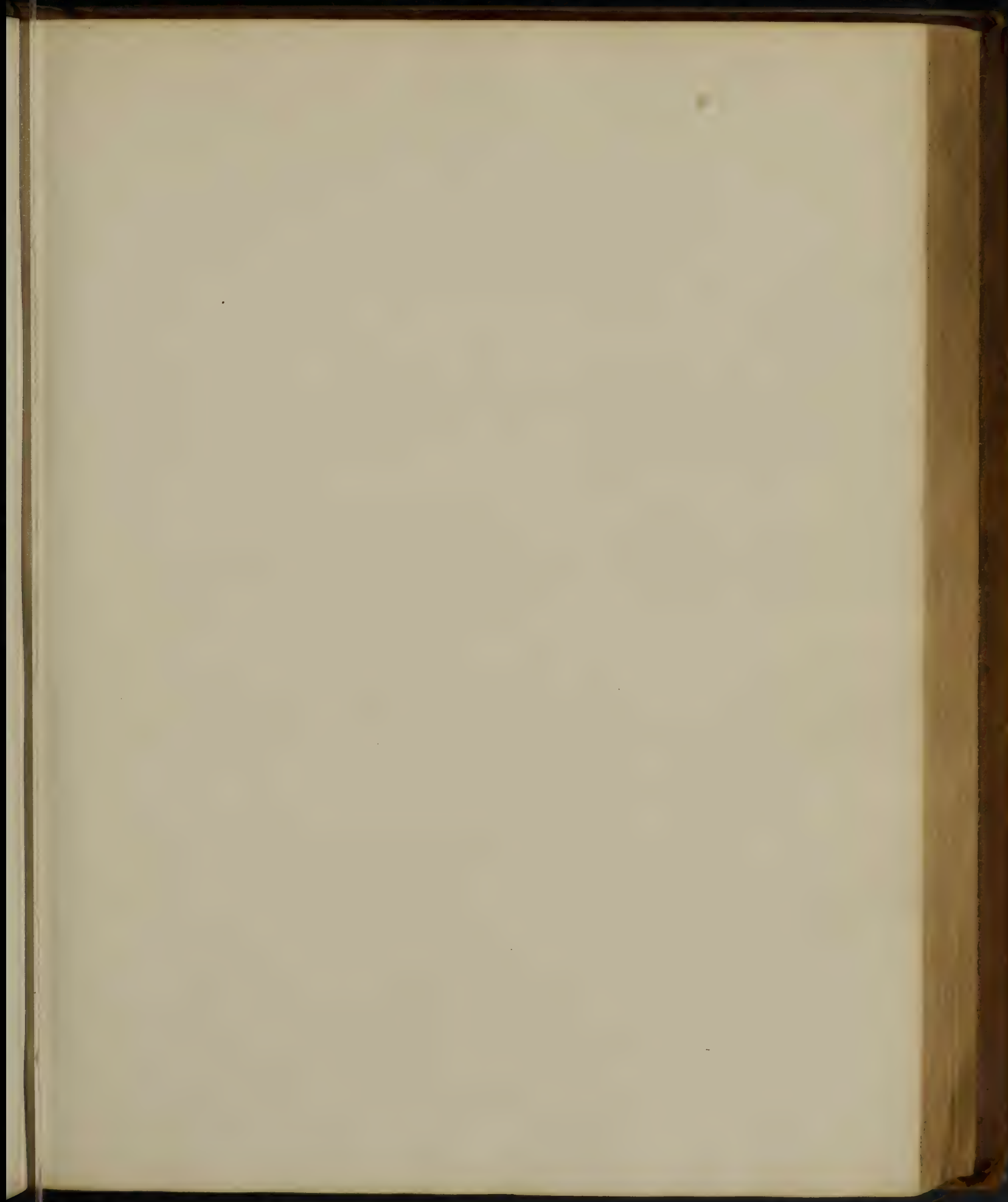




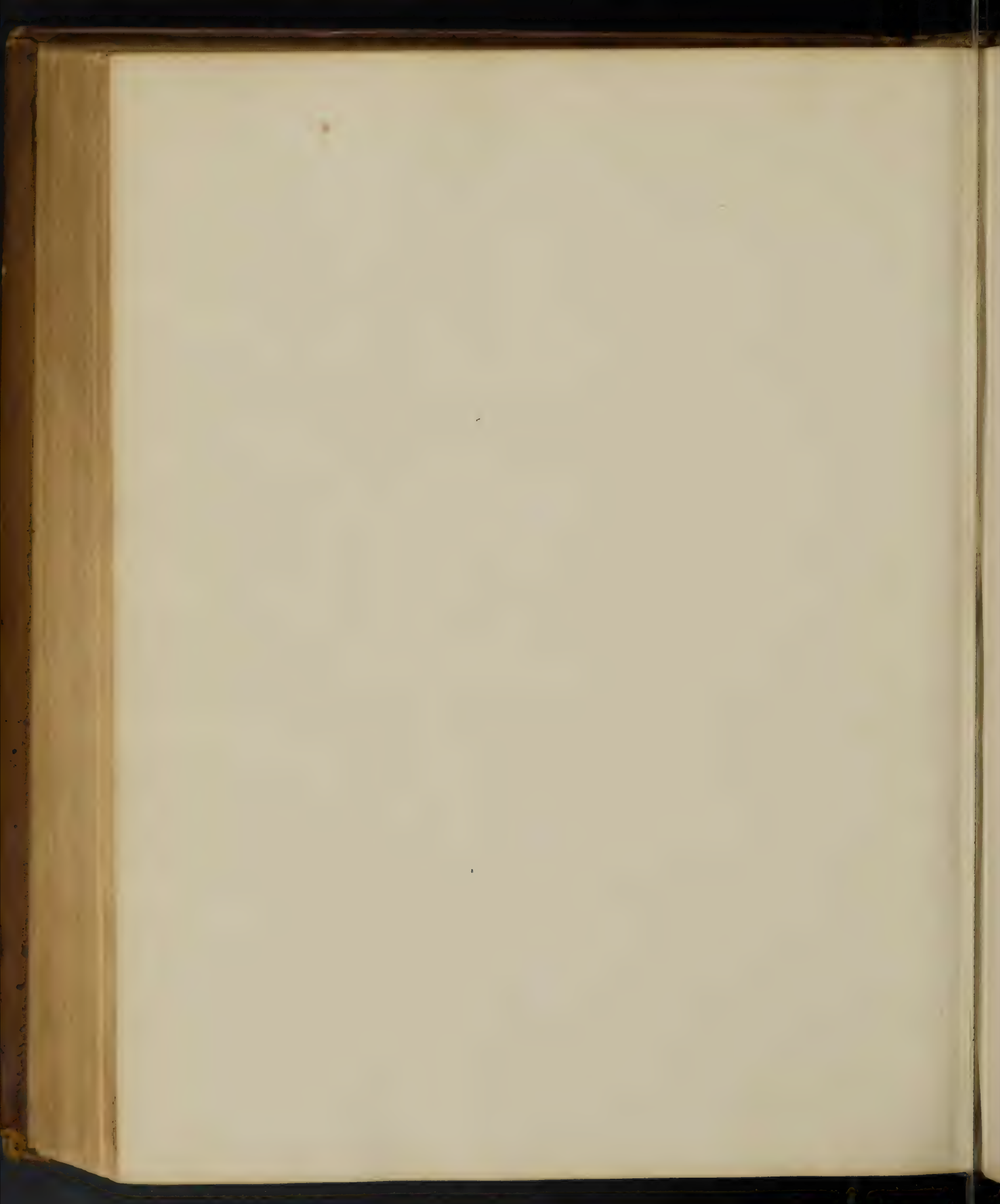


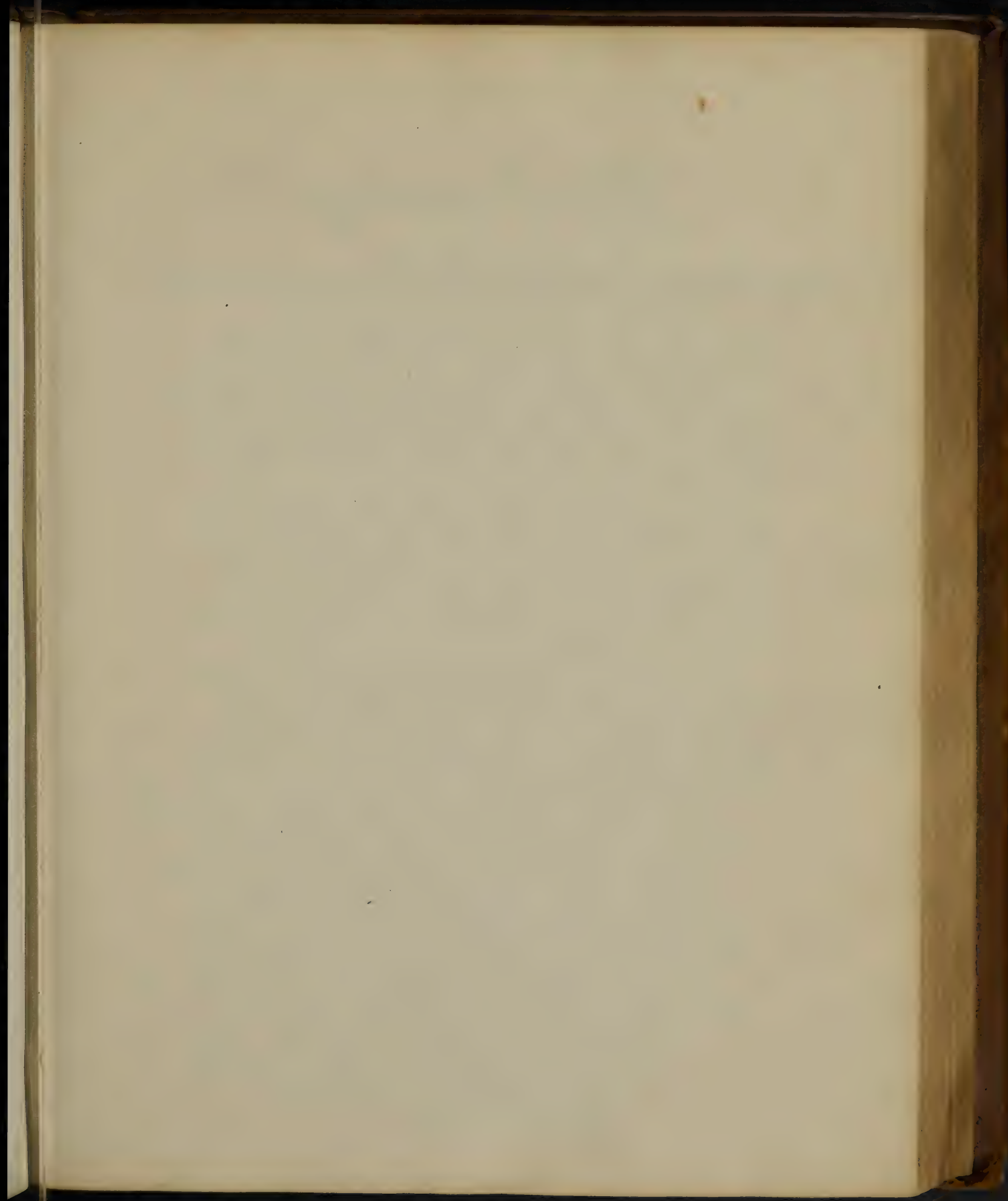




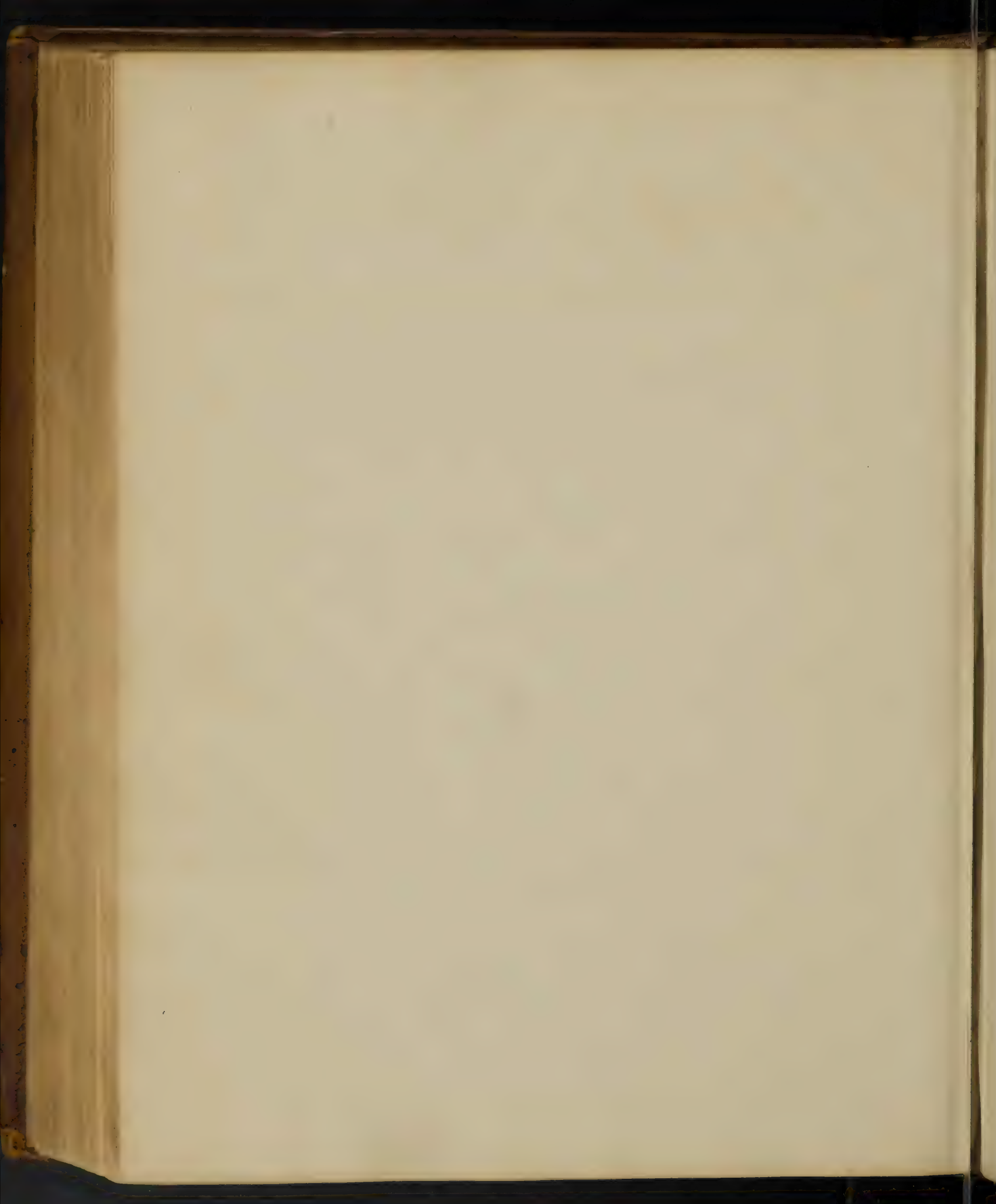












# Sheriffs and Gaolers.

## The nature of the Office & the manner of appointing it.

The word "Sheriff" denotes in its original sense, the keeper of a County. It is derived from two Saxon words "shire" and "reeve", a governor or officer of a County. At last, the Sherrif is the first officer in the county. 11 Bl. 339, 343. 4 Bac. 430.

The Sherrif in Eng<sup>d</sup> is appointed by the King out of a nomination of three persons made by the twelve judges. He was formerly appointed by the inhabitants of a County - he was an elective officer, but he is now appointed by the King. 11 Bl. 340. 1. 4 Co. 32.

By Eng<sup>d</sup> Stat. 4 Edw. 3. and 23. Hen. 6 the Sherrif holds his office only for one year, and yet it hath been said that a Sherrif may be appointed during the Kings pleasure. & so is the form of the royal writ. I know not on what ground such an observation is made. 4 Co. 32. 4 Bac. 434. 11 Bl. 342.

In Count. the Sherrif of the respective Counties are appointed by the Governor & Council. There is but one for each County. So in Eng<sup>d</sup> they have sometimes but one Sherrif, but there are sometimes two appointed, & then the two persons make but one Sherrif. He holds in Count. during the pleasure of the Governor & Council. - So that the office determination is



## Sheriffs and Deputies.

by death, resignation, or removal. Stat. C. 383.

It is the duty of the Sheriff to reside in the County to which he is appointed. He is a County Officer. & he has no business out of it. 4 Bac 435.

He has regularly no jurisdiction out of his own County. but if it be necessary for completing an official act, regularly begun, that he should go out of the County, he has for this purpose authority, to do so. Thus if a Sheriff is commanded by the Grand Jurors, to bring a prisoner from another County, the first act, bringing him out of jail, is to be done by the Sheriff of that County where he is committed, and if he had not power to come out of it, he could not complete the <sup>act of</sup> bringing him here. So also if the Sheriff has levied an attachment on property, & the Deft. lives out of the County, he may go out of the County to serve the process on him. i.e. there must, under our Stat. be a copy left at the House of the Deft. Now the Sheriff may go out to serve this, for it is a continuance of a right not yet consummate. 4 Bac 435.

And if a Prisoner escapes from one County into another, the Sheriff of the former County may pursue & take him, for here the recaption is nothing but the continuance of his local authority. Hon. 37. 4 Bac 435.

of

## Sheriffs and Gaolers. Of the Sheriff's Deputies.

A Sheriff by C. S. may appoint Deputies or under Sheriffs who may execute all his ministerial offices. The most important of the Sheriff's duties are of the ministerial kind and it is a rule that a ministerial office may be executed by Deputy. But the Sheriff cannot delegate his judicial authority to any one. Hob. 13. Kirby 240.

But by a late Stat. of Conn. a Sheriff cannot appoint a general Deputy without the permission or approbation of the Ct. of Common Pleas of his County. Still without their approbation he may appoint a special Deputy, i.e. one to execute a particular process. So also the Sheriffs of the several Counties may appoint each other their Deputies, without the approbation of the Ct. of C. P. - a Sheriff must live in his County - but a Deputy need not. Stat. C. 501.

As the Deputy is but a Servant to the Sheriff it follows the Sheriff may remove him at pleasure, but while he continues in office his general powers cannot be abridged by the Sheriff. For while he holds the office, he is bound by Law to perform the duties of it. Talk 95. Hob. 13.

Under our Law also the Ct. of C. P. may in certain cases, fine, suspend and disqualify a Deputy Sheriff from acting in that office, on complaint made. At C. S. he is removable only by the Sheriff. Stat. C. 501. or 604.



## Sheriffs and Bailiffs.

In Eng.<sup>d</sup> the Deputy Shff. acts officially only in the name of the Shff. A writ in Eng.<sup>d</sup> is never directed to a Deputy Shff. - he is never known as a public officer, but merely as a servant of the Shff. The Deputy Shff. in common language does the Shff's errands, & having done these he gives an account to the Shff. who must make the return to the proper officer in his own name. Talk 90. Comp 60.

In Conn. on the other hand, the Dep. Shff. is a known public officer. the writs may be directed to him. & he returns all the writs he executes in his own name - whether there is an independent direction to him or not. Stat. C. 24. 212.

A writ directed to the Shff. only, may here as well as in Eng.<sup>d</sup> be executed by his Deputy - with this difference that in Conn. he makes the return in his own name, whereas in Eng.<sup>d</sup> it must be made in the name of the Shff. Whitt 237.

I have observed already that, unless a Deputy continues in office, the Shff. cannot abridge his official duties - & a contract or agreement by the Deputy to abstain from executing certain process, or not to execute it within certain local limits in the County, is void, as it is contrary to Law - it is his duty to execute all processes. Thob. 114. - The rule above prevents the Shff. from accumulating all the profitable branches of the business, & giving to his Deputy such parts as are more trifling, & for which the recompense is less liberal. A

## Sheriffs and Gaolers.

A Shff. may act by Deputy, but a Deputy can not delegate his authority. A ministerial authority in the original hands may be delegated, but it cannot be delegated in the hands of a servant to the original holder of it. A Deputy must then act in his own person, tho he may command assistance in the same manner that the Shff can. 4 Bac 442.

If the Shff. directs a warrant to two persons either of them alone may make the arrest. It will be recollected that in Municipal Law there is a difference between a private authority & a public one. When a public ministerial authority is conferred on two or more it is several as well as joint, it may be executed by either alone. It is otherwise as to a private authority, it is joint & not several unless it be so expressed. Shw. 117. 1 Inst. 181. 4 Bac 402. 403 etc.

If a Dep. Shff. is guilty of any neglect of duty, the Shff. may maintain an action on the case against him immediately, or if there was a writ of indemnity given, he may maintain an action on that. In the Shff is liable over, for such neglect of duty to the party injured, and as he is liable, it follows that he must have a remedy. A Deputy Shff. when he enters on his duty, in pursuance of Law, implicitly agrees to perform it faithfully. Will. 98.

The Shff is ex officio keeper of the Gaol in his own County, & the Gaoler is his Deputy, agent or servant, as he is appointed so he is also removable by the Shff. The Shff. is keeper of the Gaol, & it is his business to



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confine all prisoners not admitted to bail in the common Gaol in his County. This is the place intended by the Law for confinement & he has no right to put him any where else. He cannot convert a house, a shop, or any other than the common jail into a place of confinement. If he does he is guilty of false imprisonment. This I lay down as the general rule. So it however there are exceptions as if the common Gaol has been burnt down in such like case he must provide some safe place for the confinement of prisoners. Hob. 402. Salk 16 1 Salk 318. 4th ed. Salk 408

A Sheriff being ex officio keeper of the Gaol, cannot himself be imprisoned in it - for if he sh<sup>d</sup>. be put in by force he can let him self out when he pleases. for he has the control & carries the keys. As there is generally but one Gaol in the County he cannot be confined - & generally cannot be arrested in a civil case, for no man is liable to an arrest who cannot be imprisoned, & of course he cannot be hit to bail. as this is a consequence of arrest, for he cannot be taken out of his County to be committed, and to commit him in his own Gaol, soon which he has charge would be absurd. But in a Criminal case, although he may be committed to the prison in another County, & by necessity &c. Tho in a civil case the Sheriff cannot be committed, yet he may be taken to trial on oaths. In pursuance of the same principle it is a rule that the Sheriff's wife cannot be imprisoned in any civil case - hence if a Sheriff marry a female

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prisoner, he is guilty of an escape. The United States Marshall may be imprisoned in a common jail. It has been determined in Conn. that if a Sheriff is arrested in the suit shall abate, i.e. in a civil case. I doubt the correctness of that decision. If he cannot be arrested, he ought to be discharged. There are several analogous cases. If a female servant is arrested she is to be discharged but the suit does not abate. The case above Sh. have been proceeded with as if it had been a summons for the Sheriff's liability to be summoned. Styls 405. 2 Bar 239. Nibley 45.

I am now to treat

## Of the Liability of the Shff. for the acts & defaults of his Deputies.

The Deputy being the servant of the Shff. the Shff. is in many cases liable for the acts & defaults of the Deputy. The act of the Deputy is the act of the Shff. for the maxim of Law is *qui facit per alium, facit per se.* 960 98. 2 Co 89. 2 Lev. 158. 1 vent. 314. 2 Mod 119.

And this I would observe is the foundation of the Shff's right to take security from the Deputies for the faithful discharge of their duty. This Bond is only for the Shff's own security, for if any other person should take a Bond from the Deputy for a faithful discharge of his duty it w<sup>d</sup> be void. Stiles 18. 4 Bac 441.

As to the extent of the Shff's liability for the acts of his Deputies, the rule is that the official acts of the Deputy are to all civil purposes considered the acts of the Shff. & he is therefore liable.



## Sheriffs and Deputies.

but with regard to the acts of the Deputy which fall under the Criminal Law, they are not to be regarded as his acts. The Sheriff is liable civiliter, not criminaliter for it is by fiction of Law that the acts of the Deputy are the acts of the Sheriff. But the Law never makes a man criminal by fiction. Suppose then the Deputy having in his possession a lawful precept should burn or otherwise destroy it. Where the Sheriff is to be liable civiliter only, and the Deputy himself is to be liable for the tort. 2 S. Ray. 1574.  
1 Vent 238. Cro J. 330. Doug. 42. 25th. 154.

I have said the Sheriff is liable for the official acts of the Deputy. but for a Deputy's private Torts, not committed in the exercise of his office, the Sheriff is not liable. He is supposed to be a stranger to these acts. If the Deputy should commit a Battery not in the execution of his office the Sheriff is not liable. 1 Roll 99. Cro E. 175. 1 Leon. 140.

It has therefore been questioned whether if the Deputy seizes the goods of A. on an execution vs. B. the Sheriff is liable in trespass to A. It has been contended that the Sheriff is not liable because he did not command the act. But it is well settled that he is liable though he did not command the Deputy to execute the process in the manner he did. The Sheriff must suffer rather than the 3<sup>d</sup> person. 4 Black. 1000. 3 Wils. 309. 2 B. & R. 832. Doug. 42.

For a mere neglect of duty in the Deputy, the Sheriff & he alone, is liable at C. L. to the party.

## Sheriff's Bailers.

injured. The Deputy is not liable for neglect of duty to any person but to the Sheriff. But to the Sheriff, he is liable whether he has given a bond of indemnity or not. Thus if a Deputy Sheriff suffers a negligent escape, the party's remedy is vs the Sheriff himself. The reason is, that the Deputy is not a known public officer - the process is not directed to him - he has not omitted any act that appears on the process he was bound to perform. 5 Co 89, Comf 403; 6. Salk 18. Roll 94. 2 Benc 243. Esp Br 603.

I would here observe that what is called breach of duty, is meant neglect of duty. Other wise you cannot reconcile the cases. The rule is not laid down very distinctly in the books - in the case of Couper from which all the others spring. <sup>Dr</sup> Mansfield says. Wherever an action is brought for a breach of duty in the office of Sheriff by a Deputy, it must be brought vs the High Sheriff as a breach of duty in him, & if it proceeds from the Under Sheriff's default, that is a matter to be settled between him & the High Sheriff.

On the other hand for an actual Tort committed by the Deputy in his office, he is liable as well as the Sheriff. The Sheriff is liable because the Deputy is his Servant - the Deputy is liable because he may be considered a Tortfeasor, for the writ does not authorize him to commit a Tort - as in the e.g. where a process is wrongfully executed on another person. The Sheriff is liable civiliter



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but the Deputy may be considered as a mere tort  
feasor - the precept under which he is to act does  
not authorize him to commit a tort - if he does  
commit a tort, then, he is to be considered as any  
other individual. Talk 18. 1 Leon. 146. Cro 8. 175.  
743. 3 Mod 321. 3 Lev. 258.

Where if a Deputy is guilty of a voluntary  
escape he is liable. The Deputy is considered as  
any other 3<sup>d</sup> person who rescues the prisoner out  
of the hands of the law. So if the Deputy embezzles  
money he is liable as any other individual w<sup>o</sup>  
be. - But for the default of a Special deputy ap-  
pointed by the Plff's request, the Shff is never lia-  
ble. The liability of the Shff for the default of his  
Deputy arises from the supposition that he has  
selected for his Deputy an improper person - but in  
this case the plff has nominated an individual to  
serve the process. he must therefore abide by the  
consequences. If the Shff selects the Special Deputy,  
he is then liable in the same manner that he is  
for the act of his general deputy. 4 T.R. 120. Esp. Di 60<sup>th</sup>

In Conn. the Deputy is liable as well for  
neglect of duty as for positive torts, in the execution  
of his office. This distinction between the rule of the C.S.  
ours is founded upon this - that here the Deputy is a  
known public Officer - he does business in his own  
name - subscribes his own name to what he has execu-  
ted. & he may sue & be sued in his official Character.  
Sec 72<sup>a</sup> - I have said the Gaoler is an agent to the Shff

## Sheriff and Gaolers.

Now it is a rule, if after the Sheriff's death, & before a Successor appointed, any person escape from Gaol, no person is liable for the escape. The Sheriff being dead the office in his hands has expired too, therefore he nor his Representatives can be subjected. The Gaoler cannot be liable, for the death of the Sheriff is a revocation of the delegation authority under which he acts. 3 Co. 72. Cro. E. 366. -

And in this case there is no other remedy than that of recaption - the person interested may retake the prisoner. 11 Mod. 14.

If a Sheriff having begun the execution of a Process is removed before the execution is complete, he must proceed till it is completed. for the execution of process is an entire thing. the rule holds in Conn. as to all officers qualified to serve processes as Constables. Such business as he has commenced before the determination of his office, he must complete. Salt. 323. Cro. E. 73. 1 Mod. 893. 4.

I now proceed with more particularity to consider,

### The Authority & duty of Sheriffs and Gaolers.

In Eng<sup>d</sup> by C. D. the Sheriff is a Judicial as well as an Executive & ministerial officer. Hence it is that he holds H. & C. and sits himself as a Judge. 11 Mod. 343.

In Conn. the Sheriff has no Judicial authority; he is an Executive & ministerial officer; and it is the same in U. S. generally. I propose therefore to treat of the Sheriff as a ministerial officer & as a



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Conservator of the Peace in which he is an executive officer, & here I shall show the difference between Executive & a ministerial officer.

An Executive Officer is one who executes the law without any command from a superior officer. A ministerial Officer is one, who executes the law in pursuance of a command from some superior officer. Now the Secretary of State, the Secy of the Treasury &c. are executive officers. They have duties which they exercise by authority of Law without any command from a Superior. But when called upon by the President to assist him in the Cabinet, in that capacity, they are ministerial officers. So the Sheriff, when Conservator of the Peace, is an executive officer. When he executes by order of a Justice of the Peace, he is a ministerial officer.

The Sheriff as Conservator of the Peace is the first Executive Officer in the County of C.S. i.e. he is the highest County officer, & all persons are subject to his command, 13 C. 343.

Upon principles of the C.S. he may, ex officio commit to prison, without a precept, any person, who breaks the peace or attempts to break it; & in Eng<sup>l</sup>. by virtue of his judicial authority, he may bind them to keep the peace; but in Conn. this he cannot do. He may bound a special officer to pursue & take all thieves, murderers, felons, & other misdoers & commit them to jail for safe custody. When he does these by Law, he is an executive officer; but when

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when he executes by Precept, he is a ministerial officer. He must also defend the county from all enemies &c. when they come into the Land & for this purpose, as well as for keeping the peace & pursuing felons, he may command all the people of the County to attend him, called the posse comitatus & this summons, every <sup>male</sup> person above the age of 15 years, & under the degree of a Peer, is bound to attend on warning; under pain of fine & imprisonment. 1 Bl. 343. Inst 168.

In Conn. he is empowered by Stat. to suppress all tumults, riots, routs, & all other unlawful assemblies, & to command all suitable persons to his assistance. Suitable persons are I presume, as at C. S. all persons above the age of 15 years for we have no peers of the realm here - all persons then above that age may be included, & upon refusal to obey, they shall on conviction be fined &c. By the same Stat. Constables are clothed with the same powers to suppress tumults &c. in their towns, as sheriffs have in their County. Stat. c. 384.

These are the legal duties of a Sheriff as an executive officer. But his more common duties are those arising from his ministerial office. As such he must execute all legal processes, directed to him, & on refusal is liable at C. S. to fine & imprisonment. & also to an action in favor of the party injured. And indeed that he is on all occasions to execute process necessary otherwise will



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excuse him for his previous engagements.

76. 396. 27. 11. 33. Stat. c. 386.

In one particular relation to this matter there is a diversity between the Eng<sup>l</sup>. Law and ours. Here the Sheriff is liable in a civil action for neglecting to deliver a writ. In Eng<sup>l</sup>. he is not - for in Eng<sup>l</sup>. there is a writ of *habeas corpus* to compel him to deliver a writ & in case he ~~does~~ refuse to return it at the time mentioned, an attachment issues against him. Doug. 446. 27. 11. 33. 103. 53. 206. 31. 2. 291. 2. 316. Stat. c. 601.

By our Law the Sheriff is bound when required to give a receipt for any writ delivered to him. & when he refuses the Gaolers may be witnesses which will answer the same purpose as a receipt & the Law is the same as to Constables. This provision is seldom carried into effect on more process in writs of execution or final process, it is always done. Stat. c. 355.

A known officer, as a Sheriff, a general Deputy Constable is not bound to show his writ before he makes the arrest even if it should be required - the reason is, that being a known public officer, every one sh<sup>d</sup>. trust him to have such authority, & sh<sup>d</sup>. submit to any process executed by such officer: but when the arrest has been made he is bound to show his <sup>authority</sup>, that the party may know upon what cause the arrest is made - and it seems to be settled that he must show it as soon as he conveniently can after he has made the

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the Arrest. On the other hand a Special Deputy or Bailiff must show his writ before he makes the arrest, or requires, and if or den and he does not show it, the party may resist him, for it is not known that he is an officer or that he has anyone specially more than any other individual, if it is not required, he need not show it. 9609. Brod 480. esp di 604. 83. 11. 107.

And the Sheriff or his Deputy may command the power of the County when resisted in the execution of lawful process. Therefore observe it might do this in his executive capacity, for the purpose of apprehending Traitors, felonies 2 Inst. 193. 483. 1 Bro 483.

And by a Stat. of Cornwall, in case of a great opposition either made, or a suspicion that it will be made, the Sheriff, with the advice of one assis- tant & a Justice of the peace, may raise the militia of the County. All militia officers & soldiers are bound to obey him. But he has this power at C. S. without such advice. Stat C. 384. reg 001.

And the Stat. provides that he shall not return "nothing done" for having the power of the County, he is presumed to be able to perform his duty. Constables may do the same in their respective Towns.

### Of the manner of executing Process.

The Sheriff or other officer cannot break the outer doors or windows of a house to arrest <sup>the person</sup> a person, or his goods in a civil case, for



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every man's house is his castle." This <sup>is</sup> the ev-  
idence of feudal barbarity. Every man then had  
his castle to defend himself as all civil process  
was at then under the rule in those barbarous times,  
is now continued since it is settled, but it is absurd.  
there is an impropriety in saying that a man's  
house should be his castle, & thus suffer him to  
evade the process & execution of the Law. There is  
no reason why on principle he should be allowed  
to prevent an arrest by closing his doors & win-  
dows any more than he could in his field or in  
the street. 5 Co. 91. Comp. 1. Bro. E. 909. Hob. 62. Esp. 61.  
606. Mich. 383.

It is said in some of the old Books that  
tho' the execution of process be made contrary  
to this rule, by breaking the doors &c. of a house,  
the execution is good, tho' the Sheriff will be liable  
as a trespasser. But this is not Law the rule is  
not founded on principle, for if it were not con-  
sidered void, the officer w<sup>d</sup> be allowed to take ad-  
vantage & receive a benefit from his own wrong,  
which is contrary to every principle of policy,  
of justice, & of Law.

But tho' the execution of the process is not  
legal the Ct. may discharge him in a summary  
way or motion if they please or leave him to  
his plea. This discharge in a summary way proves that the  
process is illegal. they will not always discharge the officer  
in discretionary with the Ct. 5 Co. 92. 2 Mac 367. Comp. 1. 2 Bl. R. 320.

## Sheriffs and Bailiffs.

I do not find the Books explain what is meant by the term "breaking". Some have observed that in breaking a door there must be a door ajar, as to break a Lock &c. But this is not necessary. Even the lifting of a latch is sufficient breaking to convict one of Burglary - this is breaking, & thus for that & the case of breaking by Sh. H. are alike. Or removing any kind of fastening, or hoisting, a window would be a sufficient breaking.

But this privilege of Castle is now considered very strictly - that extends to nothing but outward doors & windows. Nothing but these are protected - If then the officer can enter the outer door without breaking, he may break in the inner door, chest &c. but he must not do it wantonly. The mag. requires the inner doors to be open, & on refusal may break them. Coups. 6. 7. Hobbs. 263, Comb. 17. 327. 2 Thom. 87. Esp. 504. Palm. 54.

Further - the privilege of the mansion-house extends only to the person, family, & goods of the owner or occupier of the house, not to the person or of another. L. Mansfield says it is an invidious privilege & ought never to be extended by construction. If then A. is in B's house & B will not permit the officer to enter, he may break the door. So also if B's goods are in A's house. 3 Co. 93. 6. Hobbs. 52. 1 Sidg. 186.

In criminal Process the privilege is not allowed at all. The officer if it be necessary



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may break the door after a request & refusal - for  
mission - for the public rights are superior to those  
of an individual. 5 Co 91. a 93. 4 Bac 454.

The rule is the same as on a process to find  
surety of the peace, and of forcible entry & detainer.  
12 Co 131. 4 Bac 455. Moore 606.

And when a person known to have committed  
to a felony is pursued either with or without a war-  
rant by an officer or private person, his house is  
no protection. Bacon says it is different if he is only  
suspected to have committed felony & apprehended  
it can make no difference. But the process with-  
out warrant is a hazardous one, for if he is found  
innocent, the persons breaking the door will be liable  
no doubt for it - & also for false imprisonment.  
2 Hawk. 139. 4 Bac 455.

So also the owner may be liable to  
suppress any affray, or to prevent a breach of the  
Peace, & if the persons in the affray are pursued by  
an officer & they get into their house, he may break  
the door, for this is just pursuit. 4 Bac 456. 1 Inst 86.

So also on a writ of *habeas facias possessionis*  
now the officer may break the door if entrance  
is denied him. This is a civil process, but the  
very command of the writ is to direct him to take  
possession & deliver it to the plaintiff. It is otherwise where  
it is the person that is sought to be arrested he may be  
found out of the house - & the writ does not command the officer  
to break the house to arrest the person. 5 Co 91. a)

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And the outer door of an out house may clearly be broken on a civil process - for the privilege is now construed very strictly. I believe myself, that a flower adjoining the house may be broken, this is not in the rule. I know it is considered as part of the mansion house as to arson & Burglary - but it is not so as to this case. 1 Rep. 168. 1 H. L. 698. 5 Bac 182.

And if in attempting to execute civil process the bailiff or follower of the Shff. is locked in & confined, the Shff. may break the house to release him, and if the Shff. should be locked in, he may no doubt break out himself. Palm. 52. Brod. 555.

And if a person having been arrested escapes into his house, the Shff. may break doors, windows &c. to retake him - for this is an escape - he has a right to the person of his prisoner, when he has once taken him. Roll. 12. 133. Palm 54. 6 Mod 173.

But if a person illegally arrested by breaking doors &c. & while in custody is afterwards arrested & taken by another officer on another process, the last arrest is good provided there was no collusion between the officer & the party - if there was collusion, it is not good. 2 Bl. R. 823. Esp. Di. 605.

A C. L. process might legally have been executed on Sunday, but by Stat. 29. Car. II. it cannot be done in any civil suit - and the Law is the same in law. If an arrest is here made on Sunday, it is void, & the officer who makes it is guilty.



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of false imprisonment, & if personal property be seized he is guilty of a trespass. *Salk 78. 4 Bac 456. 626.*

But in case of an escape it is otherwise, if the <sup>prisoner</sup> escape on Sunday or on any other day, he may be retaken on Sunday. This is a continuation of the officers custody. Upon the same principle that a Sheriff or Gaoler may retake one who has made his escape by force, so he is allowed to retake him in prison on that day. *Salk 626. 6 Ald 95. 2 Bac 245. 5 T. R. 25. S. Ray 1028.*

I have already observed that if a man is arrested on Sunday the officer is liable. I have further to observe that the Ct. may discharge him in a summary way - as in the case of illegal arrest by breaking open doors. *6 Ald 95. 5 H. 95.*

On the Law of arrests is founded the Law of Escapes. An Escape is when a person under lawful arrest & restrained of his liberty either violently breaks, or secretly evades such restraint, and goes at large, before he is liberated by due course of Law. It is essential to an escape that there sh<sup>d</sup>. have been a lawful arrest. & the evasion must have been before he was discharged by due course of Law. The evasion of an illegal arrest then is not an escape. *Est. Di 607. 8. 9. Barn's notes 259. 2 Bac 233. Couper 65.*

It becomes then necessary to consider what

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### What arrests are lawful & what unlawful.

Every <sup>arrest</sup> to be lawful must have been made in pursuance of lawful authority. & even an arrest may be made without Warrant or Writ. but it must be made by lawful authority. 4 Baw. 52. 607.

Now it is a rule of C. S. that when the arrest is made by virtue of a writ or Warrant, if the C. S. under whose authority it issues had jurisdiction of the subject matter of the process, it is a lawful arrest. Of course to suffer the person arrested under these circumstances to go at large before he is discharged by due course of Law is an escape - and it makes no difference whether the process was erroneous or not, if it is not void. There is a great difference between erroneous & void process. The former is good till set aside by due course of Law - by proceedings in the nature of a review, as by appeal or a writ of Error. void process is a nullity from the beginning. there is nothing lawful which is done under a void writ. 2 Bils. 234. 3 Co 141. or 441. 5 Co 64. Stra 509. Esp. Di. 333. 391. 659.

Now will observe that this rule is general, tho not universal, as I will show below. But on the other hand, if the C. S. under whose authority the writ issues, has no jurisdiction of the subject matter the process is void. & if there be an arrest made in pursuance of that writ & afterwards the party go at large, it cannot be considered as an escape, for the writ is void. 2 Esp. Di. 333. 9. & supra at 11.



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But the it is a general rule that if the Ct. under whose authority the process issues has ~~staty~~ competent jurisdiction to the arrest is good, yet the process may be void on account of irregularities - irregular process is generally void. Thus where mesne process issues not returnable to next term ~~whether~~ there was sufficient time between the date and the term day, it is void. The rule of C. L. is that mesne process shall always be returned to the next term of the Ct. from which it issues, if there is sufficient time - for if it were permitted to go over one term, it might be put beyond the second, & as the case might be the Deft. held to Bail on a cause of action to be tried 10 years hence. Considering such a process erroneous merely w<sup>d</sup>. not answer the purpose - for the error w<sup>d</sup>. be found only on trial, & till that comes the Deft. is put to the hardship of procuring Bail for 10 years to come, or be confined in prison. It is well considered void therefore when the Ct. will immediately discharge him. There can be no escape in such case. Having arrested a man on such a writ, it is the Sheriff's duty to discharge him - otherwise he must be made liable - and for doing this the Sheriff cannot be subjected for an Escape, Wils 341. 1 Root 315, Esp. Di 328. 9 Root 608. 9. Carth 140-3-8.

But this general rule of distinction between a legal & a void process will not apply in all cases to the practice in town. The general rule is

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that in *mesne* process, the Ct. to which a writ is returnable, does not issue the writ; therefore I take the rule of Court, as to *mesne* process to be this (but in case of final process before a Judge) viz. that if the process is issued by competent authority, & returnable to a Ct. that has jurisdiction of the subject matter, the arrest made under it is lawful, and of course if the party go, before he is lawfully discharged, it is an escape - on the other hand, if it is not issued by competent authority, the arrest is void as well as unlawful, & there can be no escape - there is no difference between this and the principle of the C. S.

These are the general distinctions between erroneous, void, & ~~void~~ *valid* process. At C. S. an officer having made an arrest on final process, cannot delegate the power over to a 3<sup>d</sup> person to keep him in his absence - if the prisoner gets away, the Sheriff is guilty of a voluntary escape. It is otherwise as to *mesne* process. yet I think the rule ought to apply as well to *mesne* as final process. So far as extends to the Sheriff's power of delegating his authority. for a person in the keeping of the Sheriff is under his protection, & he ought not to be allowed to deliver him to a stranger. This is contrary to the rule of Court. Pos. & Pul. 24.

The first rule as to escapes is that there must be an arrest made by authority of Law. the second is that there must have been an



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actual arrest. And here observe that bare words never makes an arrest - there must be an actual touching of the body - or in Law what is tantamount to it, a power of immediately arresting him and a submission on the part of the person. The rule then is, that if the Sheriff has a writ & says "I arrest you," & he runs away, it is no arrest. but when he has a power to arrest, & the person submits & follows the Sheriff tho he does not touch him, yet it is an arrest. & if he goes at large the Sheriff is guilty of an escape. 4 Bac 236. Esp. Dig 604. Salk 79. 586. Bulst. 62.

If a person is arrested at the suit of A. & while in the custody of the officer he has a writ of the same person in favor of B. the Deft. is ipso facto in judgment of Law arrested. So there need be no further touching him in a formal manner and if he suffers him to go at large after the delivery of the second writ to him, before he is legally discharged he is guilty of two escapes - one at the suit of A. & the other at the suit of B. 56089. Salk 239.

I doubt whether this rule, on account of our practice, is obtain in Conn. Our process is vs the persons & the estate - the party may prefer taking the estate rather than the person - if this rule did obtain here the Sheriff w<sup>d</sup> have no objection to take the property of a person of the Deft. as he certainly w<sup>d</sup> have a right to in all cases. As the Engl. Law contemplates a capias, all the

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Officer can do is to take the person - but not so in Conn.

The arrest then to be good must be actual & regularly made - and if it be not, there can in general be no escape. In all civil cases the arrest must be made on a legal writ or warrant. If it be not thus can be no escapes. There are certain criminal cases, in which the Sheriff may make an arrest without warrant - but never in civil cases.

esp. Dec. 604. Comp 64. 2 Mac 236.

Thus the arrest in a civil case must be made by authority of the Officer to whom the writ or warrant is directed. There may be a lawful warrant directed to A. to arrest B. - But this can be no authority under which D. can arrest B. It is necessary then that it give authority to the person arresting - not that the Sheriff must do it himself. he may do it by Deputy, for in this case "qui facit per alium facit per se," is a maxim which applies. If the person to whom the writ is directed has following, they may make the arrest in his presence - but if not thus made it is not good. I am not now speaking of the officers deputies. It is said the arrest must have been made in his presence; it need not be in his sight, - in his actual presence - it is sufficient when it is made that he is near & in pursuit of the same object. as where one goes to the back door and the officer goes by front door, & the person attempts to escape then



## Sheriffs and Gaolers.

back door when the follower catches him, the arrest is good. for the officer was near & in pursuit of the same object. Coup. 60. 6 Mod 211. Esp. Si. 804.

An arrest on Sunday being prohibited by Stat. some say Sunday is void of course if the party arrested goes at large, it is no escape. 6 Mod 95. Falk, 78.

And in the case of making an arrest by breaking an outer door or window of a mans house, the arrest is unlawful, & there can be no escape. Coup. 9. Esp. Si. 804.

If the officer having an opportunity to make an arrest does not make it, or refuses & the party evades the arrest, the officer is liable to plff. in an action of trespass. but as there is no actual arrest, he is not liable to plff. for an escape. 2 Mod. 23. 24. 1 S. Ray. 331. 10 Mod 251. 255.

Thus far having considered the Law of arrests, I now come to treat particularly

### Of Escapes.

Escapes are of two kinds. Voluntary and Negligent. These are all the escapes known to the Law. 3 Bro. 418. 3 Co 52.

I would here observe that every person committed to prison is to be kept in safe & close custody. And the Law requires of the Sheriff. If the person committed is suffered by the Sheriff or Gaoler to leave the limits of the prison, even for a moment, the Sheriff is guilty of an escape. Plou. 36. 3 Co. 44. Roke 806. 3 Bro. 415.

## Sheriffs and Gaolers.

A voluntary escape is one, which takes place with consent of the Sheriff or Gaoler, or other officer having the prisoner in custody. A negligent escape is one, which happens without his knowledge or consent. The word "knowledge" in the definition Mr. J. thinks sh<sup>d</sup>. be left out as superfluous. 3 R.L. 415.

1<sup>st</sup> As to voluntary escapes. If a Sheriff admits a person to Bail who is not bailable, the Sheriff is guilty of an escape - the Law does not permit it. So if the Sheriff permits a person to go out of the limits of the goal yard even for a moment, the under the care of a keeper, he is guilty of a voluntary escape. The reason is obvious - if the Sheriff permits the prisoner to go 10 feet over the limits for one moment, he wants to have equal authority to permit him to go an indefinite distance for an indefinite length of time. & thereby the coercion intended by the Law w<sup>d</sup>. be defeated. 1 R.L. 886. 3 Co 44. 2 Bac 205 & 235. Plowd. 30.

The rule is the same when a person is arrested on final process, the not committed to prison is permitted for any time to go at large, no matter for how short a space of time. It is otherwise when arrested on mesne process. 2 T.R. 176. 2 Bos & P. 26.

Persons committed on criminal process are confined here, as I presume they are in Eng<sup>d</sup> & secured within the walls of the prison. Those committed on civil process are permitted, by procuring security to save the Sheriff's name in case of



## Sheriffs and Gaolers.

Escapes, to the liberties of the prison yard. This is considered as the prison wall, in judgment of Law. but if he grants this privilege to a criminal, he is guilty of a voluntary escape.

It has been determined in Eng.<sup>d</sup> that if a person committed by the Sheriff or other process, is brought up to Westminster Hall on Habeas Corpus ad testificandum, the Sheriff is guilty of a voluntary escape. This is certainly not Law. It would be monstrous to say he was guilty of a voluntary escape - for as the case might be, the same Ct. who made this decision commands him to bring the prisoner before them. & on refusal he w<sup>d</sup> be liable to a contempt of Ct. & might be imprisoned. I am happy to find the case denied to be correct. 1 Sidg. 13. - Bul. & P. 72. 1 Root 72. Kirby 137 3 Bac 238.

But if an Officer, who brings out a person on Habeas Corpus, grants him any unnecessary or unreasonable liberty - as going abroad - he is guilty of a voluntary escape. Thus when the Sheriff, who was commanded to bring a prisoner from one County into another, took him a circuit of 60 miles, for the purpose of giving him an airing, as he said, he was held on guilty of a voluntary escape. The rule then is, that when a prisoner is brought out by Habeas Corpus, the officer must bring him in a reasonable time & must bring him in the most convenient road. 3 Hal. 305. 2 Ray. 2. 1. 399. 768. 6 Mod. 8. Cro. 6. 14.

The Law also requires that an officer having

more

## Sheriffs and Gaolers.

made an arrest on final process, must commit the party arrested to prison in convenient time, & if he does not he is guilty of a voluntary escape. The rule is the same (as that I mentioned) if he permits him to go out with a servant - for an officer making an arrest cannot delegate to another person an authority to keep the prisoner in his absence. 1 Bos & Pul. 24. 2 T. R. 176.

If the Sheriff marry a woman committed to prison, he is guilty of a voluntary escape & she is discharged. The reason is that he cannot detain his wife in prison. Flow. 17.

And if the Sheriff appoints one of the prisoners a turn-key to the Gaol, he is guilty of a voluntary escape. For by appointing him to this office, he gives him an opportunity to escape when he pleases. & therefore cannot be deemed the Sheriff's prisoner. The rule is the same even tho the prisoner never leaves the prison, & for the same reason. Esp. Di. 608. Hardr. 311.

If a person having the privileges of the Gaol-yard, goes over the Limits, the Sheriff is guilty of a negligent escape, not a voluntary one. But if the person having the privilege of the yard has manifested an intention to escape, as by attempting at a former time to escape &c. it is the Sheriff's duty to confine him within the walls, & if he neglects to do it & the person afterwards goes out of the limits, tho the Sheriff is not present at the time, or even gives his permission, - he is guilty of a voluntary escape. 2 T. R. 116. 1 God 11612.



## Sheriffs and Gaolers.

It will not be at present that a Sheriff is not bound to grant the privilege of the Gaol yard, even though there be a sufficient bond of indemnity offered him. The prisoner cannot claim it as of right. Not being bound to grant this privilege the Sheriff of course may put an end to its enjoyment of it whenever it is in his opinion the most proper. 2 B. & C. 131. 2 East 16. 100. 127.

Secd. 4<sup>th</sup>. III<sup>d</sup>. Negligent escapes are such as happen without the consent of the Sheriff or Officer holding him. Thus if the party evades his restraint and makes his escapes by violence, or by fleeing from the Officer, it is a negligent escape. It is also if he escape by breaking Gaol, or if he be rescued, or by any other means without the consent of the Officer, it is a negligent escape. 3 B. & C. 415. 6. Cro. 419. 104. 8. S. 131.

I would here observe that in an indictment for the Sheriff for an escape the Officers endorsement on the back of the writ is sufficient to shew that the writ was delivered to him. Cowp 83.

I am to consider the difference between escapes on mesne & those on final process.

I have observed heretofore that if a person arrested on final process is permitted by the Officer for one moment to go at large, the Officer is liable for an escape, even though he was never committed to prison. & the reason is that the imprisonment on final process is the coercive means of obtaining payment, & is in operation at the time of the arrest made. If the Officer might suffer him to go at large

## Sheriffs and Quotors.

larger for an hour, he might for any length of time, & thus the object of the *San.* would be defeated.

2 T. R. 171. 3 Bl. 415. Esp. Di. 605.

But on the other hand, a person arrested on *mesne* process & not committed to prison, may be suffered to go at large without subjecting the officer, if the prisoner is forthcoming, i.e. will surrender himself up at the return of the writ. The reason is that this process is not a coercive means of obtaining payment for the debt has not been liquidated by due course of law, & further the object of the process is merely to compel the attendance of the Deft. in Court, as a security for the sum which the plaintiff may eventually recover. The officer is guilty of no escape till the avoidance of the writ by the Deft., as if he does not appear at the time of the return of the writ, then the officer is liable for an escape.

There is a difference between the C. L. & our own. In Conn. the officer is not guilty of an escape if the Deft. is forthcoming at the ~~trial~~ <sup>trial</sup> in the life of the *ex'con*, or till a *non est* inventory is returned by him. 2 Bl. R. 1049. 2 T. R. 172. 5 T. R. 37. Palk 408. 2 Wils. 295. Con. Stat. 29. Hinley 209. 382. 434.

It may be asked when the officer may make a return of *non est* inventory? The C. L. have never established a definite rule as to the time it is to be made. It is proper that a reasonable time should be allowed.

But if the party thus arrested is *mesne*



## Sheriffs and Gaolers.

process is not forth coming at the return of the writ according to the rule of C. S. writ in Com. in-  
ring the life of the action, the officer in both cases  
is guilty of an escape - and it is a negligent one,  
tho the books do not declare it to be such. Yet  
it must be a negligent escape for the officer  
has a right to let him go at large till the re-  
turn of the writ. North. Supp. 522. 552. 568  
10p 86 00p.

But if the person arrested on mesne process  
is committed to prison, the Gaoler or officer suffering  
him afterwards to go at large is guilty of a coun-  
try escape, & an after return does not bar the  
action vs the officer. The reason is that having  
committed him to prison, he has no other duty  
to perform than to keep him in close & safe cus-  
tody. & is not now to be set at liberty but by  
due course of Law. 2 Wils 294. Falk 271. 1sp. Di.  
610. 1 Roll. 807. Stat. Con. 222.

And in this case, as I observed a return  
of the person after being permitted to go at large, does  
not bar the plff's action vs the officer - nor does  
the plff by proceeding in the first suit, waive  
this right vs him. 2 Wils 296. Falk 271.

There is also a difference in the remedy  
to which the plff in the process is entitled, in the  
case of an escape on mesne & final process.

If one arrested on mesne process escapes,  
the plff's only remedy at C. S. vs the officer, is the action

## Sheriff and Gaolers.

action of Trespass on the Case. - Here the damages are presumptive, & the action cannot be supported unless the plff proves a legal claim vs the party escaping. 2 T.R. 129, 2 Wils. 290. Cro.E. 17. 4 T.R. in 4 Co. 611. 2d ed. 673.

I will barely observe that in the above case an acknowledgment out of Ct. of the party escaping that he owed the debt to the plff. is good evidence in the action vs the Sheriff. This is contrary to the general rule. the reason is that as the acknowledgment of the Sheriff w.<sup>d</sup> have been good evidence for himself, & as the Sheriff after judgment obtained vs the party escaping would have been liable for that judgment for the debt he is not complain. 1 Rep. N. 169. Parks N. 65.

For an escape on final process the plff. may have his election of two actions, viz. trespass on the Case, or by Stat West. 2. & 1 Rich. 2. he may sue the officer in debt. 2 T.R. 129, 132. 2 H. Bl. 110. 2 H. Bl. 1048. Wheat. 183.

The rule holds on final process whether the escape was before commitment or not. It makes no difference in maintenance of an action of Debt - which is the most eligible action, as there may be a material difference as to the rule of damages. If the action be vs the Sheriff or Gaoler, whether the escape is on mesne or final process the law may give what damages they please. with or without the debt - or part of the debt with special damages.



## Sheriffs and Deputies.

yes if there give only special damages & not the whole debt, the plff may still proceed & recover on an action of debt. Exp. de 609. 410. 296. 2 d. i. 129.

But if the plff. on final process bring debt as the officer, the jury are bound by law to give him the whole sum for which the original debt was liable together with costs. This is not founded strictly on the form of the action but on the Sheriff's liability. - 2 d. C. 120. 2 d. C. 1. 1043. Exp. de 609.

Our Stat. Law of Conn. in one respect seems to have furnished a new rule of damages. for whatever the form of action may be, or whether the escape be on mesne or final process the officer is liable for all the damages & the plff. shall recover the whole sum. This is on a voluntary escape - the rule of this State is the same as that at C. L. for negligent escapes. Stat. 366 sec 10.

If a person arrested on mesne process before he is committed to prison is rescued, the officer who made the arrest is excused. but if after an arrest on final process there is a rescue, the officer is liable. the reason given is that he had time & might have raised the posse comitatus to assist him. The reason does not appear to me a substantial one - for the officer must take him the first place in which he meets him - he might not have had time to have gathered a pistol and I can see no reason at all for the distinction. 3 Bl. 410. Bro. 872. Prof. 412. Exp. de. 610.

## Sheriffs and Gaolers.

But after a person arrested on mere process is committed to prison, a rescue is no excuse for the Sheriff or other officer, unless it was made by public Enemies - a rescue by Rebels, Traitors or Insurgents is no excuse. Nothing but public enemies are supposed to have power equal to that of the Sheriff. This presumption cannot be rebutted. 1 Wood 508. 1 Co 84. 2 Wm. 482. Esp. di 410.

The rule is the same where a prisoner, who is arrested on final process, is rescued, tho he is not actually committed. In case of an escape effected by rescue where the Sheriff is liable the plaintiff may maintain his action either vs the Sheriff or vs the Rescuers. But by bringing his action vs the Rescuers he waives his remedy vs the Sheriff. It is said: The rule seems to me a reasonable one & I believe it to be Law, tho I can find no authorities to the point except in penance. By bringing the action vs the Rescuers the Sheriff supposes himself discharged & takes no care to secure himself vs the rescuers, who had been seized originally by the plaintiff. He could have had a remedy over <sup>vs</sup> them. Esp. di 557. 650. 610. 6 Mod. 211. Lord C. 77. or 109. in another ed. Hutton 93.

When the plaintiff sues the Rescuers, he waives on principle sue in trespass on the case. But after it laid down in Hobart that he may bring either trespass, or trespass on the case. Now does arise this is not Law. Trespass is not adapted to the plaintiff's case - if the action of trespass is considered as the proper



## Sheriffs and Factors.

proper one, the debt must be considered as paid in the possession of the plff. but this cannot be. The damages too are consequential, this proves the action sh<sup>d</sup> be case. And further I know of no instance where trespass and Case are concurrent. Cro. A. 486. see rule in Hoott. 180.

In an action vs rescuers, the jury may give the whole or only a part of the original damages or demand - if they give only a part he may then bring his action vs the original Debtor, in order to recover the whole sum. Sed. 211. Esp. 657. 659.

But tho the jury may give less than the whole damages, yet they will seldom do it. Rescuers are entitled to no indulgence. they should be made to smelt for trespassing the sum.

In an action vs an officer for an escape on mesne process, his return of rescue is at C. L. conclusive evidence that the prisoner had escaped from him by rescue - the plff. cannot rebut it. But if it be a false return, the plff is not to be remedied - he may still have a new action vs him for a false return. Cro. E. 781. Com. 6. 295. 1000. 224; 2 Vent. 175.

I will now observe that the above rule of the C. L. has been complained of. that the officer might defeat the plff's action by a false return. & yet the plff may turn about, & bring a new action for the false return - I think the rule of Law is correct. the reason for it is that the Law will not

## Sheriffs and Gaolers.

not allow the official act of an officer to be contradicted in the first action, because the falsity is not put in issue, and it is not to be supposed that the officer is always in a situation to prove the truth of all his official acts & returns. Therefore it is there must be a new action. In Comm. however we have permitted the Sheriff's return to be contradicted, it may then be doubted whether the above rule is not in Comm. Law.

As the Sheriff is liable in certain cases of rescue, so he may also have an action on the case against the rescuers. But this can only happen when he is liable over to the Sheriff. It cannot happen the day when the rescue is made on mesne process, it is only on a rescue on final process, his right of action is founded on his liability to the Sheriff. *Crowder v. W. 100. 101. Hob. 180. Hutton 28. 4 Bac 399.*

As a Sheriff is liable for a rescue after the prisoner has been committed it is evident that he is liable for a rescue when he is bringing out a prisoner on habeas corpus. - Rescue in such case is no excuse for the Sheriff for he sh<sup>d</sup>. have had sufficient force. *114. 482. 37. 10. 010.*

You will remark that after a person is arrested on final process & after his commitment on either mesne or final process, nothing but the act of God, or of public enemies will excuse the Sheriff for an escape. Hence it has been determined that the burning of the Gaol by common fire not being



## Sheriffs and Gaolers.

by which the prisoner escaped was no excuse in Sheriff.  
You will find it laid down in Bacon that  
if the prison takes fire whereby the prisoner escapes  
this will be a sufficient excuse for the Sheriff and he  
may plead it. Lord Soughborough says all the cases  
must mean fire by lightning. Thus in the tremendous  
fire which raged in London about the Year 1656  
which consumed many thousand houses & several  
Gaols, the Sheriff was holden liable for the escape of  
the prisoners. and in the case of the famous riot  
of Lord Gordon, who broke open & released from the  
prisons several thousand prisoners, Parliament were  
obliged to pass a special act to excuse the Sheriff as  
he w<sup>d</sup> have been liable. 2 Mac. 247. 4 C. 84. 11 Geo 503.  
4 Geo 7 879. 2 H. 80. 113.

And I believe the same rule was established  
in the State of N. York, when the Burglar's Riot  
took fire & the prisoners fled, the Sheriff was not liable.

There are some differences to be observed  
between the Consequences of voluntary & negligent escapes.

It was formerly holden to be Law that  
in case of a voluntary escape in final process  
the prisoner was absolutely discharged from the  
Wks demand, & the liability was transferred to  
the Sheriff and the Sheriff &c. came in the party who was  
obliged to escape. But this is not now considered  
as Law for as the rule now stands the Sheriff may  
either have a new action to the party escaping  
i.e. an action of Debt or assumpsit to him who is  
obliged to escape.

## Sheriff's Return.

Issue a Sci. fa. on a new execution. He may take care  
 of these returns. You will observe that if a  
 return is not made the party is liable to be  
 on a Sci. fa. 760b. 60. 202. 1 Geo. 330. 1 Vent. 4. 26. 2 Nov. 136.

And now by the Stat. 8 Geo. 4 Will. 3. a new  
 execution may issue in a summary way without a  
 Sci. fa. or return he may relate his in the original  
 return - this latter he may do at C. S. 13a. 126. 2 H. 241.  
 3 Bl. 415. 6 Cr. 2. 555. Bul. N. 2. 69.

And if a person committed on mesne process  
 is permitted to escape, the Sheriff may relate his in an  
 escape warrant, i.e. when the escape is voluntary.  
 3 Co 53. 2 C. 16. 295. 20p. 611.

But in case of a voluntary escape neither  
 the Sheriff nor Justice can relate the prisoner, nor main-  
 tain any action against him, for he is noticeps criminis  
 - it is an unlawful act & if after suffering the  
 prisoner to escape he relates him, he is guilty of  
 false imprisonment. Yet the Sheriff is not deprived  
 of his remedy. 3 Bl. 415. 3 Co 52. 1 Geo. 330. 2 H. 176.  
 1 Vent. 269.

### Sect. 5<sup>th</sup>

I have observed that a Sheriff's permission a  
 voluntary escape is guilty of a crime. Hence it follows  
 that henceforth both the Sheriff & Justice shall be liable  
 in case of a voluntary escape is void. The remedy is  
 obvious - it is contrary to duty to permit a voluntary  
 escape. 10 Co 100. 2 Bulst. 213.

I observed that after a voluntary escape the  
 Sheriff or Justice cannot relate the Escaper but the 6th.



## Sheriffs and Bailiffs.

may & the p<sup>l</sup>ff may recover of the escape even tho he has prosecuted the Sheriff & Bailiff to judgment: provided as soon he has recovered is not the whole amt. But where he has recovered the whole debt of the p<sup>l</sup>ff &c he cannot recover again of the escape. 3. R. 969. 10. R. 311.

But tho the Sheriff loses all personal control over the prisoner in case of a vol. escape - still in case of a neg<sup>t</sup> escape the Sheriff & Bailiff may retake the escape or he may maintain an action of the p<sup>l</sup>ff so escaping. He has a right to this action & that is mediately, because he is immediately liable over to the p<sup>l</sup>ff. he need not wait therefore till the p<sup>l</sup>ff sues him & for he sues the Escaper. Bro. 53, 234. 3 Co 52. 2 R. 612, 613. 1 Bac 45. 6.

And if the Sheriff has taken a bond to indemnify himself of this negligent escape, he may recover on that - he may take this bond for he is permitted by Law to do it. 1 Root 151.

But tho the Sheriff in case of negligent escape is entitled to an action of the Escaper, yet his Bailiff can maintain no such action by the Statute. The reason is that the Bailiff is not liable over to the p<sup>l</sup>ff in the process. You will remember that the Sheriff's Bailiff & under Sheriff is only liable for positive torts - he is never only liable over to the Sheriff. But the Sheriff may have an action & may give him the benefit of it by permitting him to sue in his name. 10 R. 510. Bro. 345.

## Sheriff's Duties.

This latter rule is not a rule of Law in Court. There the under Sheriff is a known public officer. The process is usually directed to him, and as he is his liability to the plaintiff, he must be entitled to an action at the party escaping. It has been determined in Court that if a person escapes from one State into another he may be taken on an escape warrant in the latter State - it is not the escape warrant that entitles him to do this, it merely shows his right.

In Eng<sup>d</sup>. you will remember that the plaintiff may have either a new action of debt or judgment at the party escaping or he may issue a writ, or a new writ, or by a later Stat. he may issue a new writ in a summary way with a writ, or he may be retaken on the original execution. But this will not do when he leaves this State & goes into another; the usual mode is to retake him on an escape warrant. See case of Nichols & Ingham in Johnson's R. see also 3 Day 495.

A person escaping under criminal process, is guilty of a misdemeanor at C. S. - it subjects him to fine & imprisonment; & if he escape by breaking prison, upon principles of C. S. he is guilty of a Felony - this does not seem to be the case in Court. 2 Wash. R. 122, 128, 4 Bl. 129, 130.

If an officer after having made an arrest of a Felon, suffers a negligent escape, he is punishable by fine - & if he permits a voluntary escape, he is punishable in the same manner as the offender.



## Sheriffs and Gaolers.

would have been. He is considered as accessory after the fact. However high the offence may be in case of a negligent escape, he is only punishable by fine. But when he is guilty of a voluntary escape, where the prisoner is committed for felony, he cannot be punished till sentence has been passed on the party escaping. for it is a general rule of Law, that an accessory cannot be tried, till the principal is convicted. Otherwise the officer might be punished for treason or felony, & he who was arrested & escaped might turn out an innocent person. 4 B.C. 120. 1 Hale P.C. 390. 2 Hawk 134.

But tho he is not subject to sentence till after the escape is convicted, yet he may be fined & imprisoned. for tho the party sh<sup>d</sup>. evade punishment altogether, he is guilty of a great misdemeanor, & may therefore be punished for it. It is essential by C.D. that the principal sh<sup>d</sup>. be convicted before the accessory can be, but there is no impropriety in punishing the officer for a misdemeanor. 4 B.C. 120.

If a Sheriff for negligent escape has been subjected to pay the debt of the Escaper, he may maintain an action of indebit. assumps. At the Escaper, for the money paid & the expenses. This is on the common principle, & it has been determined twice at Sir 20 Trials, that where the Deputy has permitted a voluntary escape, & the Sheriff had been subjected to pay the debt, that the Sheriff might maintain this action of indebit. ass. vs the party escaping. And

## Sheriffs and Gaolers.

But these decisions were afterwards overruled by Lord Kenyon. Esp Di 612. Lalk 18. Peake 146.

Now I confess I think the two former decisions correct - but it is clear that if the Sheriff himself has permitted the escape he cannot recover, for it is quasi criminis; but here it is not his own act - he is supposed not to be privy to the offence. The official acts of the Deputy are the Sheriff's own act, in civil cases. But he is not liable for the torts of his Deputy - i.e. he is liable for the acts of his deputy civilliter but not criminally - If, then in the view of the criminal fact he is not guilty, I cannot see why he ought not to recover vs the escapee.

If after a negligent escape the Sheriff retakes the prisoner on fresh pursuit, before action brought vs himself, his liability to the plaintiff is discharged. When we say retaking the prisoner on fresh pursuit, we mean retaking him at any time before action brought. The 908. 3 Co 44. 52. 11 Mod 211. 217. 2 D. R. 126. Cro J. 659. 1 Root 106.

At C. L. when Sheriff relies on this excuse, i.e. recaption on fresh pursuit, he must plead it specially - he cannot give it in evidence under the general issue. In Comm. it makes no difference whether the replication & the plea agree or not. Under the general issue the Defe may here give in evidence whatever he pleases. See the Eng. rule of pleading in 2 D. R. 126.



## Sheriffs and Gaolers.

But if the suit is lost. & the Sheriff before recapt-  
tion, & subsequent recaption, does not discharge  
his liability to the p<sup>l</sup>ff. The reason is that having  
lost an action he has a right to pursue it to judgment  
and execution. Cro 2. 657. She 873. Cro 2. 657. 3 Co 44. 52.  
Holt 108. 4 Benc 247.

As a recaption by Sheriff in a next escape,  
before action, discharges his liability, so also does  
a voluntary return of the escaper. for a voluntary  
return is equal to a recaption. it makes no  
difference how he comes back, so that he has him  
in custody when he is wanted and before an ac-  
tion is brought. 2 S. R. 126. 1 Bos & Pul 413. Com. R. 554.

But in case of a vol<sup>y</sup>. escaper, a return  
before action lost, or a voluntary return, does not  
discharge the Sheriff. He has no right to retake  
him. nor to imprison him in case he volunta-  
rily returns; if he does it is false imprisonment  
on the officer doing it. 3 Co 52. 2 Wils 294. Esp 81. 6 H. 512.

Now as the rule is expressed with a subsequent  
assent of the p<sup>l</sup>ff in the process purge away the  
Sheriff's liability, in case of a voluntary escaper. I  
do not know what is meant by his subsequent  
assent. Lord Holt says an assent before escape  
discharge the Sheriff, but one after a<sup>?</sup> not. There is  
an assent before escape the p<sup>l</sup>ff consents & therefore  
by permitting it no liability attaches to the Sheriff.  
The reason why a subsequent assent will not dis-  
charge the liability I presume was this, that after a

## Sheriffs and Gaolers.

a right of action has accrued, no subsequent parole assent can destroy that right. (Suppose the subsequent assent be made in writing?)

Salk 271. Esp di 612.

On the other hand in case of a negligent escape the Sheriff may retake the prisoner after an action brought against himself - he is permitted to do this for his own security, being liable over to the plaintiff.

It has been determined in Eng<sup>d</sup> that the Sheriff has no right to discharge a prisoner committed on execution, even upon payment of the contents of such execution - but in Conn. I believe the Sheriff & Gaoler frequently does this. The reason (I think) of the rule in Eng<sup>d</sup> is, that the Sheriff has no right to take the money after he has committed the prisoner. He may receive the money on the execution & discharge the prisoner previous to commitment, but afterwards he is to keep him in *velut a salvae custodia* - he then has no right to receive the money more than a stranger - he is not the Agent or agent of the plaintiff - when he does this therefore he is guilty of a voluntary escape. Bro 2. 404. 11 Mod 194. 8 Mod 225. 336. 2 Bac 248.

I have observed that after a negligent escape the officer from whom the escape is made may retake him. But if after a negligent escape the Sheriff discharges him, the officer cannot retake him even for his fees - yet if the Sheriff receives all his debt & costs while he is in custody the officer may retain him for his fees. I suppose the reason of the

the



## Sheriff and Gaoler.

The difference to be that the Sheriff & Gaoler is supposed, in a negligent escape, to be the negligent party or the faulty person, & having suffered the prisoner who was a lien or pledge in his hands to go away, he never shall recover - for it is a general rule of Law, that if a person has a lien & he loses it for one moment, he loses it altogether. - therefore when he loses it thro' neglect (as a civil wrong) he can never retake it. If he is not yet discharged he may retain him for his fees, for now he has not given up his lien. This will show that the two rules are consistent. *Thos. 108. Esp. 511.*

An escape by a prisoner having the privilege of the Gaol yard being a negligent escape, or recaption or a voluntary return of the prisoner by his action does not discharge the Sheriff's liability. And if in such case he has taken a bond of indemnity, he may maintain an action upon it, for the bond is to indemnify him in case of escape, as if he goes away only for a moment, & returns the next, still the condition of the bond is broken & he may recover - but he will in general recover no more than nominal damages, having suffered nothing by the breach of the bond. *1 Hool 100. 7. 127.*

But if after such an escape from the privilege of the Gaol yard the plaintiff's action against the Sheriff is barred by the Stat. of Limitations, which in this State is two years from the time the next default occurs, the Sheriff cannot recover on the bond against the escapee for  
there

## Sheriffs and Gaolers.

There is no consideration. He is now safe. The Ct. direct the jury generally to give only nominal damages. If Judge had been recovered on the bond, & the Stat. of Similitudes not barred the Plffs claim, the Deft might obtain relief on audit. *Lancaster 1 Root 151.*

It were very important to be understood in pleading, which seems to conform the distinction between negligent & voluntary escapes, viz. that under a Court as the Sheriff for a voluntary escape, the plff may give in evidence a negligent escape: it follows then that in an action counting on a voluntary escape the Deft. may plead a retaking before action brought, without contradicting or traversing the Count of voluntary escape. This is a clear rule of pleading. It may be asked how a plff is to avail himself of the difference between a voluntary & negligent escape? He is to do it in his replication, which is to be done in the nature of a novel assignment. If the Sheriff pleads a recaption on fresh bail & the plff intends to plead on voluntary escape, he must do it in a novel assignment and this puts the Deft to his defence to say it was or was not voluntary. In Eng<sup>d</sup>. the plff. generally counts on an escape only - neither voluntary nor negligent. *2 Bac. 248. 1 Vent 217 211 & T. 66 126.*

I have observed that for a voluntary escape by the tender Sheriff he himself is personally liable but for a negligent escape the Sheriff only is liable. It seems then that if the party is careless,



## Sheriffs and Gaolers.

voluntary escape brings an action vs the sheriff or Gaoler, the Sheriff is discharged. There is no authority for this but is perhaps in general. I w<sup>d</sup> not depend upon him alone. But the rule is a reasonable one. If the Sheriff had thought he w<sup>d</sup> be made liable, he w<sup>d</sup> never have meant to have secured himself as the Deputy, and now it may be too late. Esp. 412.

If after an action is brought vs the Sheriff for an escape, or final process & before the plea is pleaded the original judgment vs the prisoner is reversed, the Sheriff may plead null tili record, which will be a sufficient plea to discharge him, for after judgment is reversed it is annihilated.

But if after judgment has been obtained vs the Sheriff, the original judgment is reversed the judgment vs the Sheriff stands good - it is impossible now for the Sheriff to avail himself of the reversal - indeed you will find the rule is after plea pleaded, he cannot avail himself - but according to the rule of modern practice allowing an alteration of plea he may be allowed to plead null tili record. 3 Co 142. Holt. 209. 3 Mod 325. 2 Bac 248.

But it will seem as a result very unreasonable, that after judgment vs the Sheriff the original judgment is reversed, & yet the Sheriff is bound to pay according to the judgment obtained vs him. According to the principles of justice the Sheriff sh<sup>d</sup> not be permitted to recover vs him - the Sheriff may be released by an audit. Quarta, tho he cannot by plea.

## Sheriffs and Gaolers.

Sec. 6<sup>th</sup> If a Sheriff or other officer makes a false return he is liable in an action of trespass on the case to the party aggrieved by the falsity. The Plff cannot in Eng<sup>d</sup> have an action. The rule there is if the Sheriff makes a false return the Def. cannot plead in abatement, in contradiction to it, but must sue the Sheriff in an action on the case for the false return. 11 Wils. 336. Esp. Di. 615.

But in Conn. the Def. may plead the falsity of the return in abatement. This defeats the pl<sup>ts</sup> action & he, being the party injured may have an action vs the Sheriff. At C. L. the plff cannot have an action vs the Sheriff for a false return, unless the return is falsified by him est inventus - if such false return be made, he is entitled to an action for he is the party injured. But for such return the Def. can have no action, for it is no injury to him. 120 E. 729. 1 Wils. 650. Esp. Di. 616.

If a prisoner in Conn. escapes thro the insufficiency of the Gaol, the County & not the Sheriff is liable. In Eng<sup>d</sup> for such escapes the Sheriff is liable, for he himself has the building of it. In Conn every County builds its own Gaol, & therefore they are very justly made liable for the suffering of it. 1 Root 450. Stat. C. 367. 8.

The plff's remedy vs the County is by petition to the Ct. of Con. or Pleas, praying that the County Treasurer be directed to pay the damages to which the County had become liable. The Stat. does not allow



## Sheriffs and Gaolers.

allow an action. If the County Court do not allow the petition, the person may apply to the High Court, i.e. by way of appeal. Stat. sup. Kirby 318. 1 Wood 30. 1 Wood 158. 275. 278. 357. 450. 505.

In general according to the decision of our Ct. the liability of the County is nominal - for it has been held, if the escapee is a responsible man, able to pay, the person must come on him. - & if he has no property the Ct. say the County shall pay nominal damages only. The Creditor loses nothing; he would have gotten nothing by arresting the Deft in Gaol, & therefore he might as well be out as in. And in case any person assists him to escape, he must come upon that assistant for his damages. This decision of our Ct. seems to be a very strange one, for it renders the Stat. altogether nugatory; it is also an impolitic rule, for so long as this doctrine prevails the County has no inducement to keep a good Gaol. 1 Wood 125. 155. 278. 357. 505. Kirby 318.

There is however one class of cases where the liability on the County is substantiated. when the person escapes, is at the time of the escape, able to pay the debt &c. and thus by escaping evades the payment. here the party may come on the County, & recover the whole debt.

If the escape was facilitated by misconduct or negligence of the Sheriff or Gaoler, then the Gaol is sufficient cause the Sheriff or Gaoler is liable, as it has neglected to make the necessary repairs & there is

## Sheriffs and Gaolers.

consequent escape, or if he knows the prisoner has implements to effect an escape & does not take them from him, he is liable.

### Miscellaneous Rules.

If a Creditor voluntarily discharges from custody a Debtor taken on Execution whether committed or not the Execution & Judgment are discharged forever. he cannot relake the Debtor. The reason is that the body of the debtor is deemed a sufficient satisfaction for the debt, and hence it is that whilst a person has the ~~custody~~ body of the prisoner confined he cannot pursue any other remedy vs him - now if he gives up the body his remedy is lost. Fla. 550. 7 T.R. 420. 1 S.R. 557. 6 T.R. 525. 8 T.R. 123. 4 Burr. 2482. Blitts 182.

And tho he discharges him in consideration of a new promise to pay the debt & this promise is broken, the rule is the same - the Execution & Judgment are discharged; he cannot relake the Prisoner but he may maintain an action vs him on the new promise. So also if there is an agreement or promise on the part of the prisoner that the Creditor may relake him & recommit him on the old execution if he does not pay the debt by such a time, still the Creditor cannot relake him on that Execution tho he may maintain an action vs him grounded on the new promise. 4 Burr. 2480. 1 S.R. 557. 6 T.R. 525. 7 T.R. 420. 2 East 243.

And so far has this rule been extended, that if the new contract made with the Prisoner is defeated by informality, yet the judgment remains discharged. (1 S.R. 557. 6 T.R. 525.) & he can have no remedy.



## Sheriffs and Gaolers.

And further. If the Prisoner on being discharged gives a bond conditioned for again rendering himself in execution, i.e. that he will surrender himself at within a certain time, that bond is void as to the Sheriff, & the Sheriff has no remedy upon it, and if the Sheriff releases him afterwards he is guilty of false imprisonment. for the rule is that when he voluntarily discharges the prisoner he gives up all claim. 1 Bos & Pul. 242. 2 East. 243.

If two joint debtors are taken in execution a release of the body of one of them by the Sheriff is a release of the whole debt, & the other is of course discharged. And I suppose it is the same if they are joint & several debtors & one is discharged. I do not find any precise rule as to this point, but I should think it a discharge of both as in the last case; for they are both joined in the judgment & pay, it are made joint debtors. 1 Bond. 193. Talk 574. 1 Ray. 690 Cro. C. 551. 1 Chitty 182. Cro. C. 55. 5 Co 81.

But in the application of this rule, it is necessary to distinguish between a joint indebtedness & a common liability. for if under the same contract the holder of a Bill of exchange or promissory note discharges one endorser taken in execution without satisfaction, he may sue another indorser of the note, & the reason is that they are not joint debtors. Each indorser is bound independantly of the others. Hence they may all be proceeded to at the same time, or any one of them at a time, & if they are all taken in

## Sheriffs and Quotors.

in Ex'con, a discharge of one does not discharge any of the rest. 2 B.C. R. 1235. 4 T.R. 825. 2 Show 451. Chitty on Bills of Ex. 124. 181. 2.

It was formerly decided by Lord Holt, that if a sole debt. committed to prison on Ex'con, died in prison the debt was forever extinguished. & for this reason that as the plff had chosen his highest remedy, he never sh<sup>d</sup>. be permitted to have any other. But this is a fallacious reason, & the decision cannot now be considered as Law. There are numerous decisions to the contrary. Hob. 52. But in 21 Jac. 1 a Stat. was made enacting that the plff may sue out another Ex'con as the estate of the deceased debt<sup>r</sup>, as if there had been no prior execution. 2 Bac. 554. Cro E 850. Cro J. 136. 143. Kinsley 183.

And if one of two joint debtors dies in prison, it was always holden, (in dependant of the Stat.) that the other was not discharged. 5 Co 86. Cro E 850. Cro J. 136. 143.

A bond to the Gaoler condition<sup>d</sup> that the obligor shall remain a true prisoner till the debt, fees & board are paid, is utterly void by Stat. 23 Hen. 6. which Stat. was made to prevent extortion in the Shff. Now under this Stat. a bond to remain till the board is paid is void - and it seems that a penal bond that he will remain till the fees are paid is void (tho he may retain the prisoner for his fees, for it may obligat him to a penalty. The Shff has a right to take a bond, for fear of a negli-



## Sheriffs and Gaolers.

gent. & escape, for receiving a true prisoner; but not for board or fees. 10 Co. 100<sup>b</sup>. 11 Int. 237. Plow. 68. 1 Pow. on S. 170. 7 Hol. 14. 2 Will. 351. 4 Bac 464. 10 Mod. 139. 12 Mod. 6. 18 Wms 126.

What remains of this title is some of the  
Provisions of Count. concerning Gaolers &c

It is here promised that by the C. L. all prisoners are bound to support themselves, (except felons at law, whose prop. is forfeited & who in judgment have no money) - in other words the plff. or the Public is in a criminal prosecution, are not obliged to find them in necessaries for their support. (Hoaden says they may live on the charity of the People, & if they cannot get that, in the name of God let them die). Plow. 68. 1 Mod 132. 12 H. 583 & 168.

Our Stat. provides that persons committed to prison for any offence must pay their own charges, as well as the expense of commitment if they have the means to do it. and their Estate is bound for this expense; and if they have no property they may be assigned in service till they earn enough to pay the same. Stat. 2. 365. 5. 223.

But their expenses in criminal cases are paid in the first instance out of the State or Town Treasury & the Town or State has a remedy vs the Prisoner, if he be able to pay.

Our Stat provides that if the Gaoler receives from the prisoner for fees a greater sum than is allowed by Law, he is obliged to pay the balance to the

## Sheriffs and Gaolers.

to the prisoner, & a fine to be imposed by the County Ct. at their discretion. Stat. 363.

When a person is committed in any civil process he is obliged to bear his own expenses unless he is admitted to the poor man's oath - i.e. that he has no Estate Real or Personal to the amount of \$12. or sufficient to pay the expenses. On taking the oath he is discharged of course, unless the Plff allows a weekly sum for his maintenance, which is to be lodged with the Gaoler. Observe this is only in civil cases. Root 117.

If then the Plff continues him in Gaol, by allowing him a weekly maintenance, he must lodge the weekly sum with the Gaoler. But tho he does not allow him this, & he is of course discharged any property he may afterwards acquire will be liable. & the Plff may have a new Excon or sec. for. Root 58.

The only use of this oath is to discharge the Body of the Prisoner. Before the oath can be administered to the Debtor the Plff must be duly notified; (4 days previously) to attend at the Gaol, to show cause why such an oath should not be administered. If no good reason is shown to the contrary, it is to be administered. The oath may be administered by any Justice of the Peace. Stat. C. 365.

If the application for this oath proves unsuccessful, the debtor cannot afterwards make any application to any person, but to the Clerk of the Ct. & Common Pleas & one Justice of the Peace;



## Sheriffs and Gaolers.

or to two justices of the Peace, one of whom shall be of the Quorum. On the oath being administered (in the first instance by one justice of the Peace) the plff may apply, if he sees cause to the Chff Jus. of the Ct. of C. D. or one justice of the Peace, or to two justices of the peace, ~~consensu~~ <sup>consensu</sup> to review said cause; & if the Creditor shall make it appear to the satisfaction of the tri-ers that he is not entitled to the benefit of such oath, they have the power to order the allowance for his support to cease, & thereupon the debtor shall be holden in prison in the same manner as if the oath had never been administered. Stat. C. 365.

But when the Creditor allows this sum, the charge ultimately is to be paid by the Prisoner, & if the Creditor chooses to continue him in prison, he cannot procure his enlargement without paying this expense & the original debt. Stat. C. 365.

When a County is without a Gaol, any person liable to be committed to prison, may be committed to the Gaol, in an adjoining County. Idem.

Fidels & Debtors are not to be lodged in the same room. If they are the Gaoler will be liable for double damages.

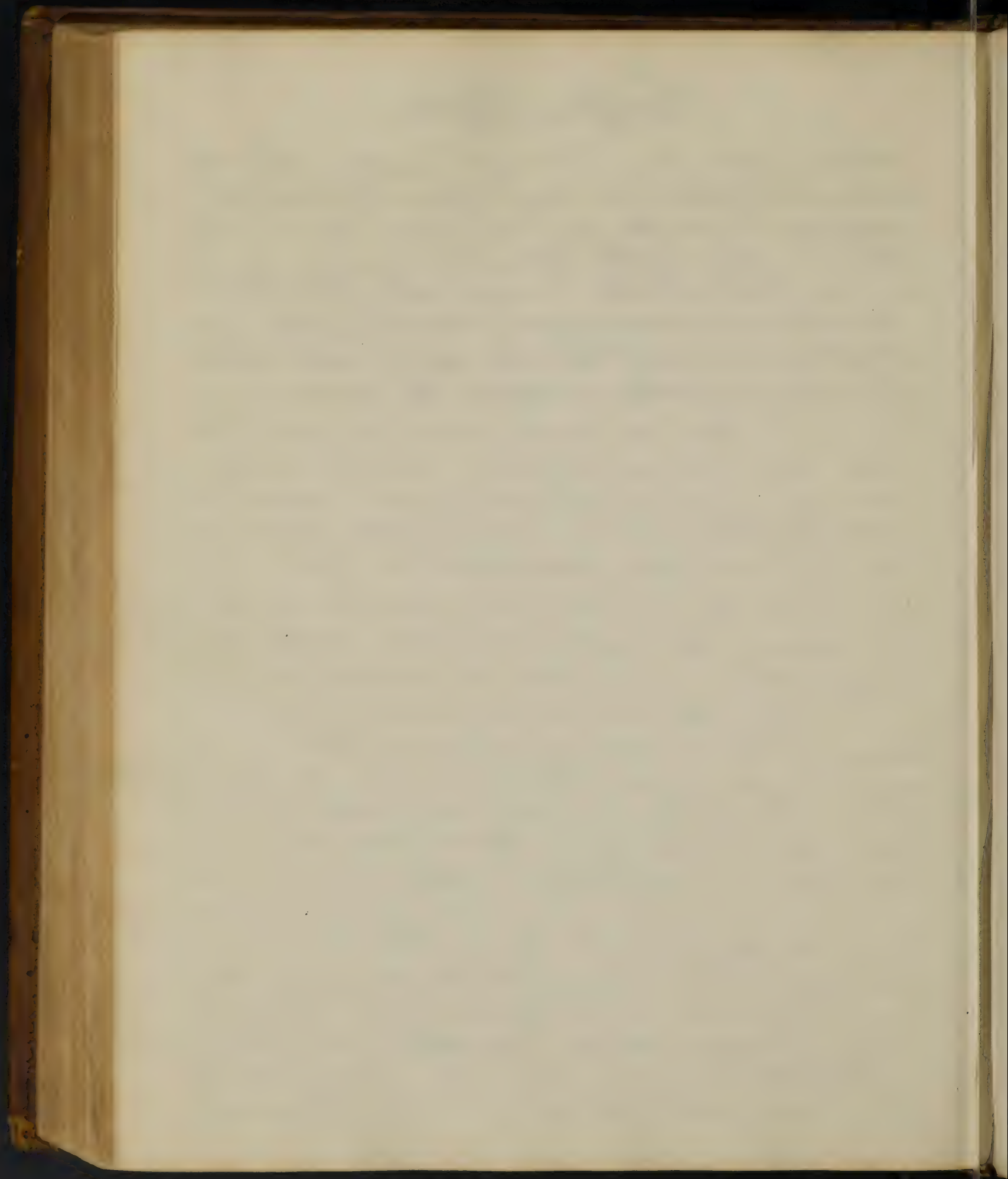
Our County Cts. have a right to order into close confinement all persons committed for debt, fines, damages or cost - except he was committed on an <sup>arrest</sup> ~~arrest~~ issued by the Superior Ct. and the Sup. Ct. may give the same order. you will recollect the Plff may grant them the liberties of the Prison yard - but the

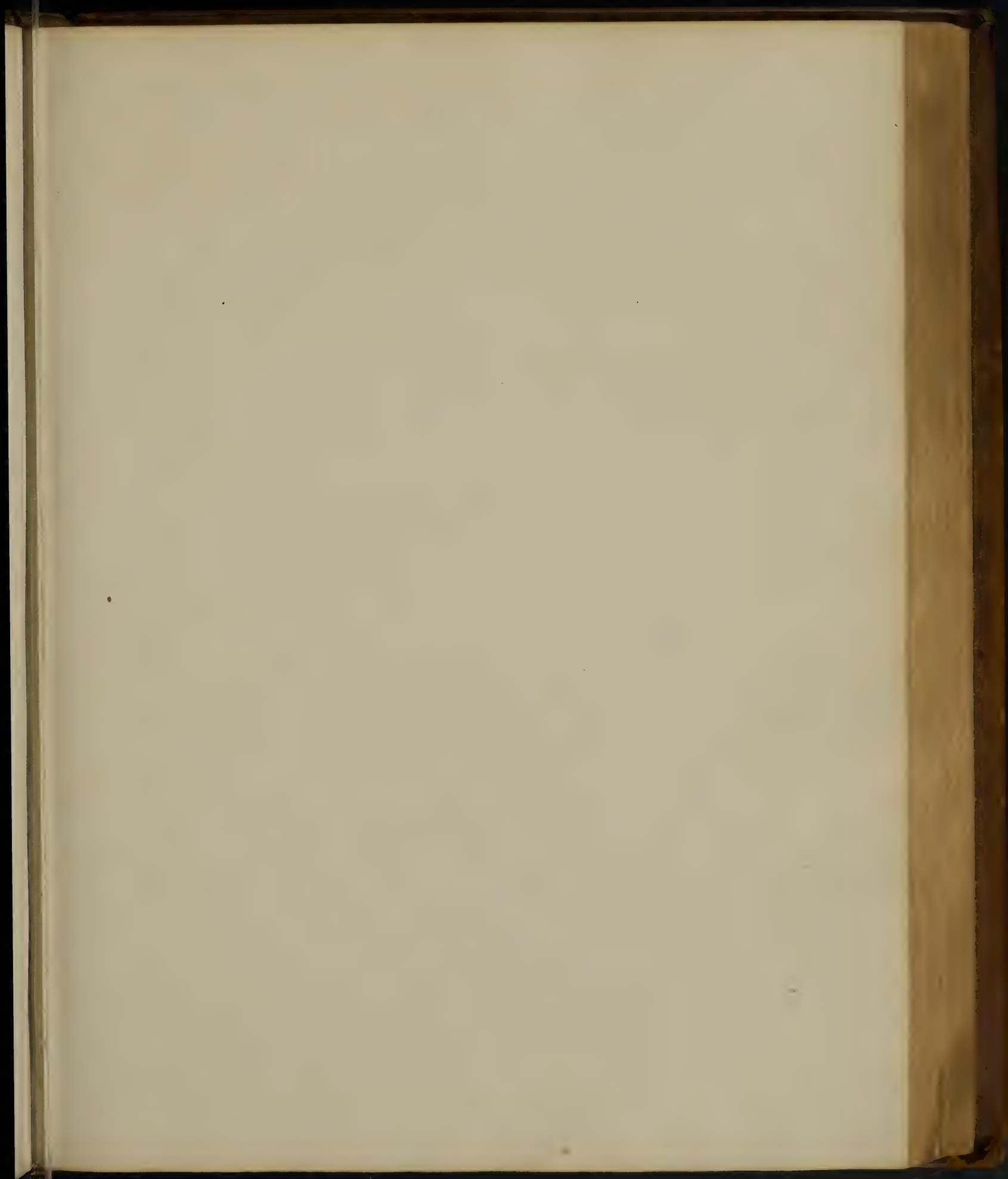
## Sheriffs and Gaolers.

He may order him to be confined within the walls.  
And if the Sheriff does not obey, he is guilty of a voluntary  
escape & is liable for the debt &c. for which the  
Prisoner was committed - Stat. C. 365.

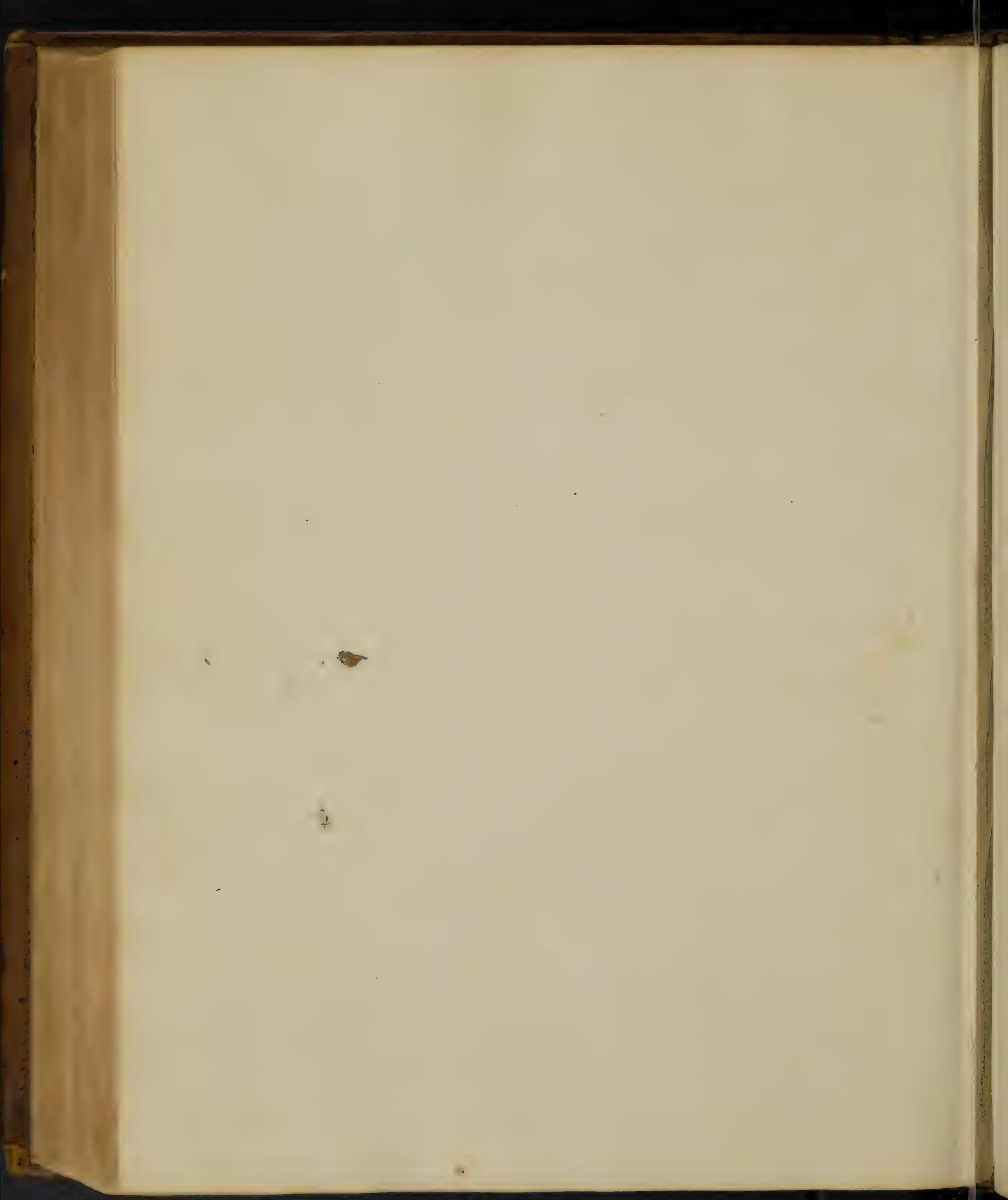
This authority however of the Sup<sup>r</sup> Court County  
Cts. does not extend to cases where the person is com-  
mitted for a Sum less than 100. - if it is under this sum  
they cannot receive him within the walls.

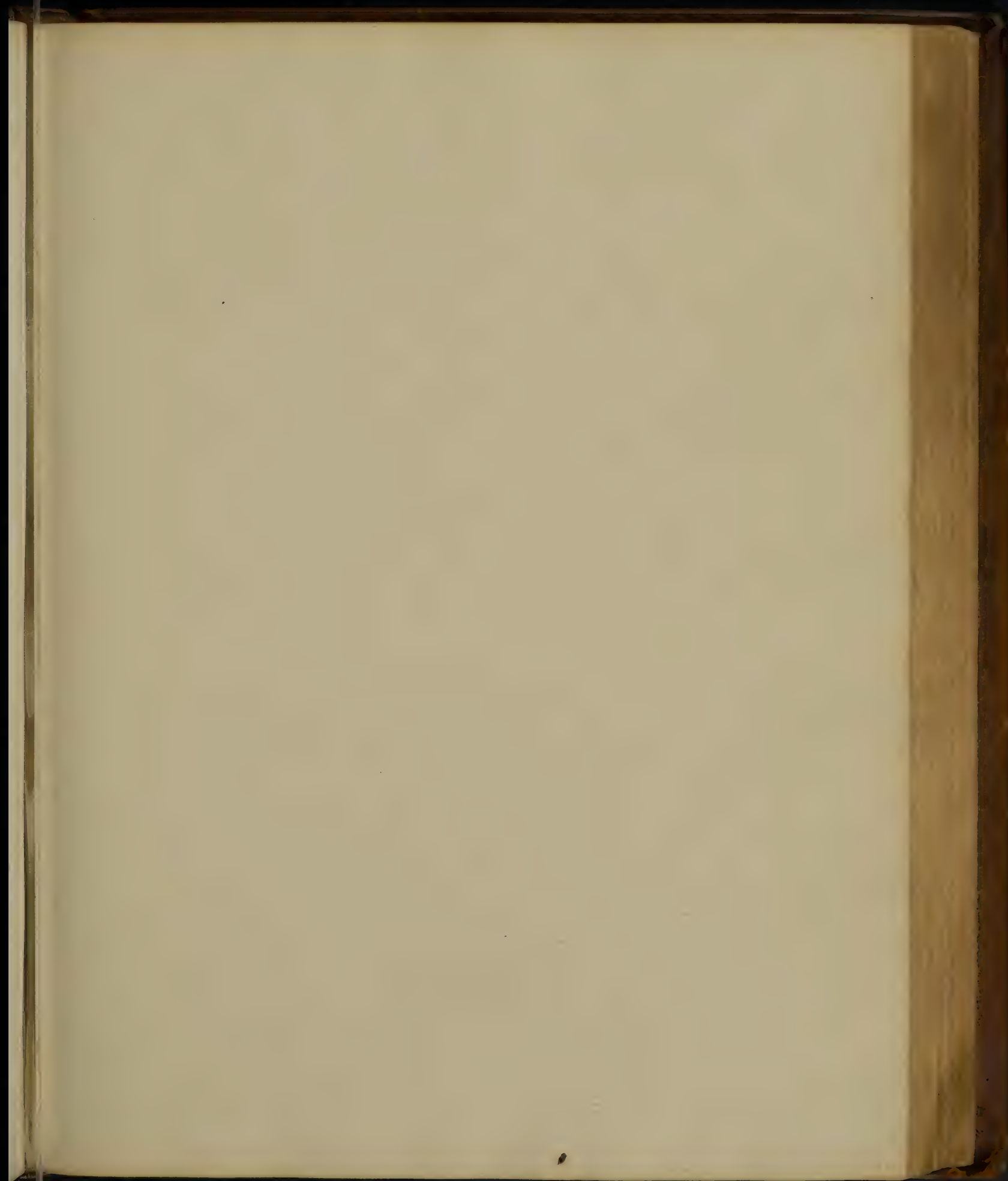




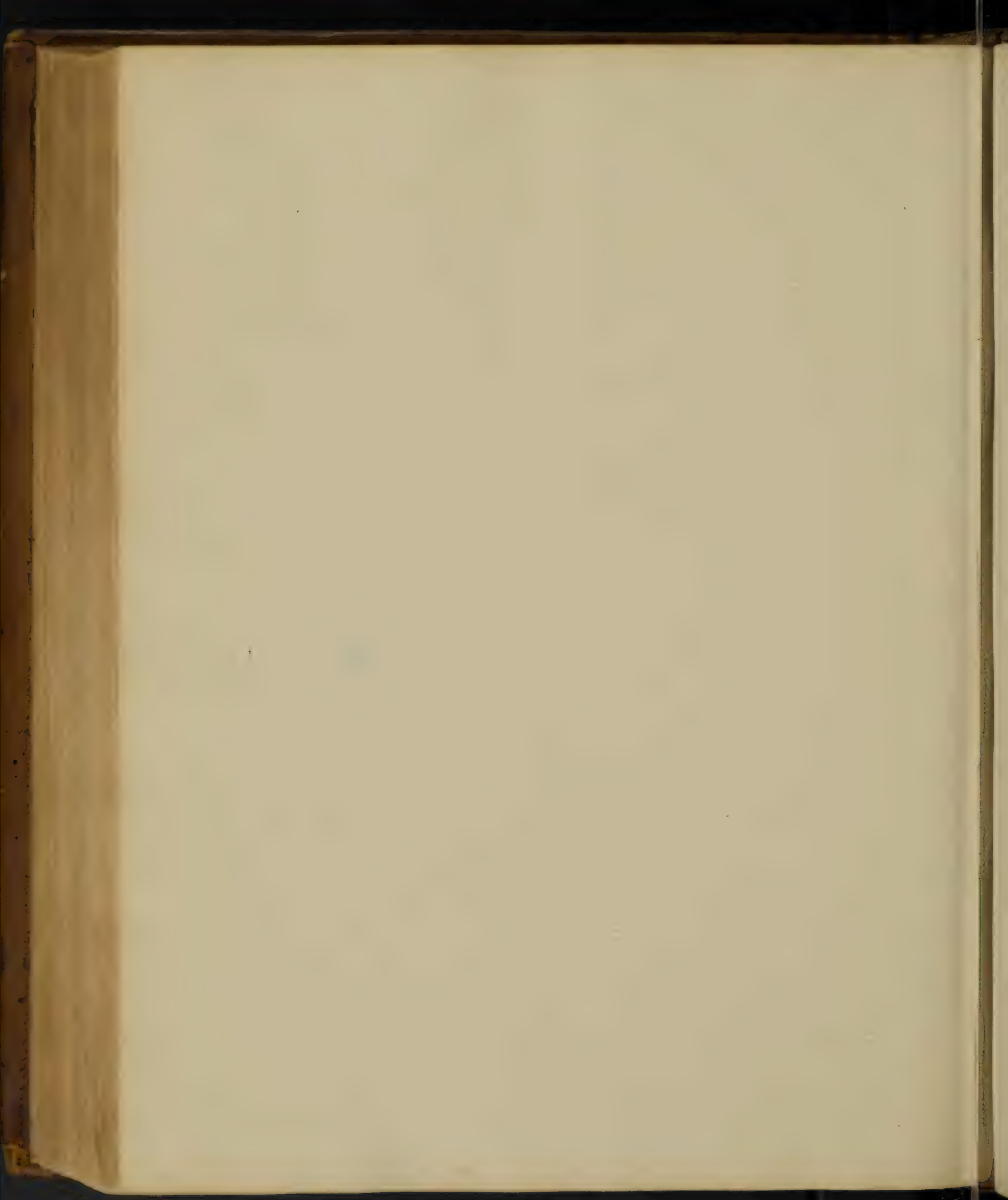


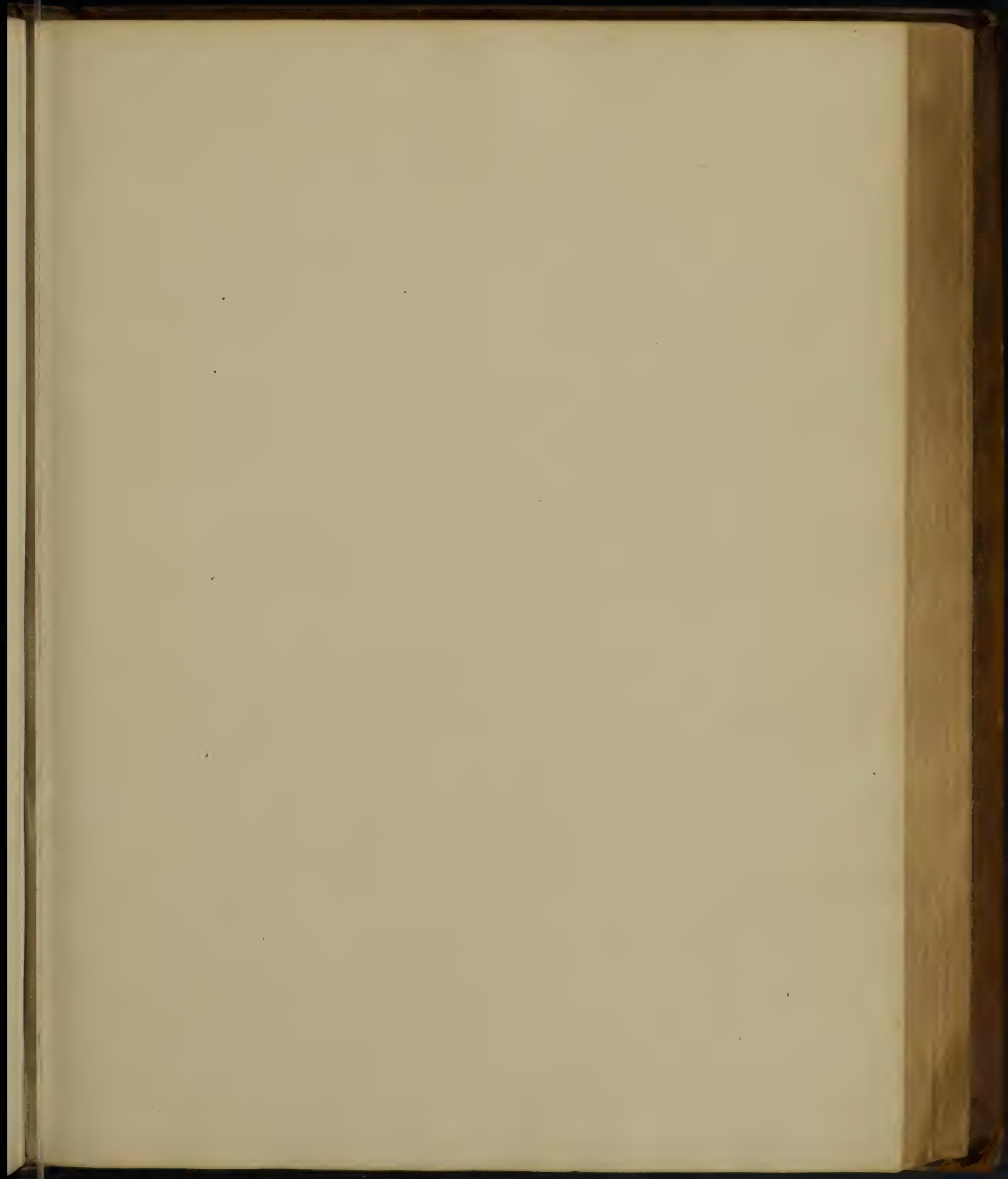




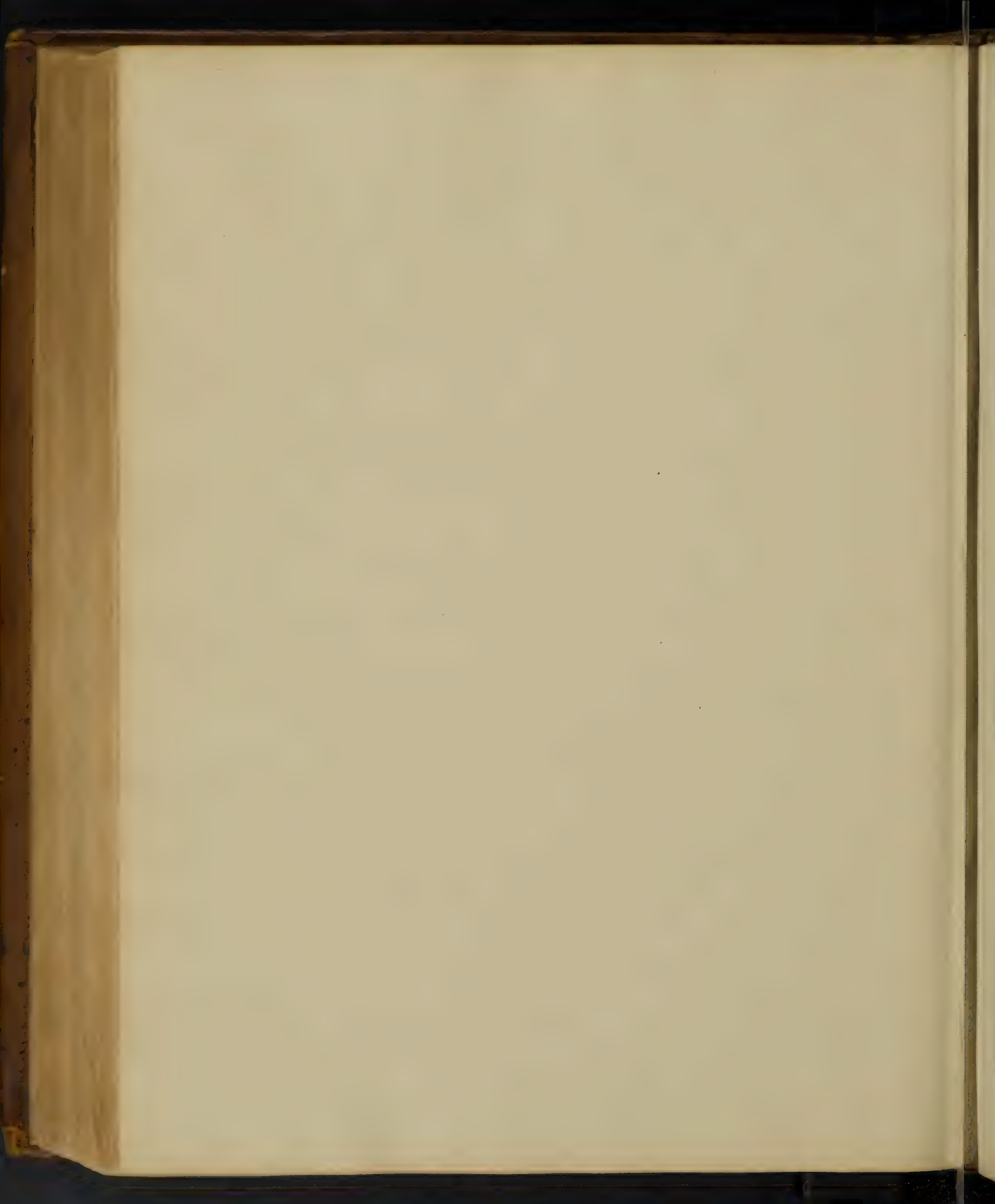


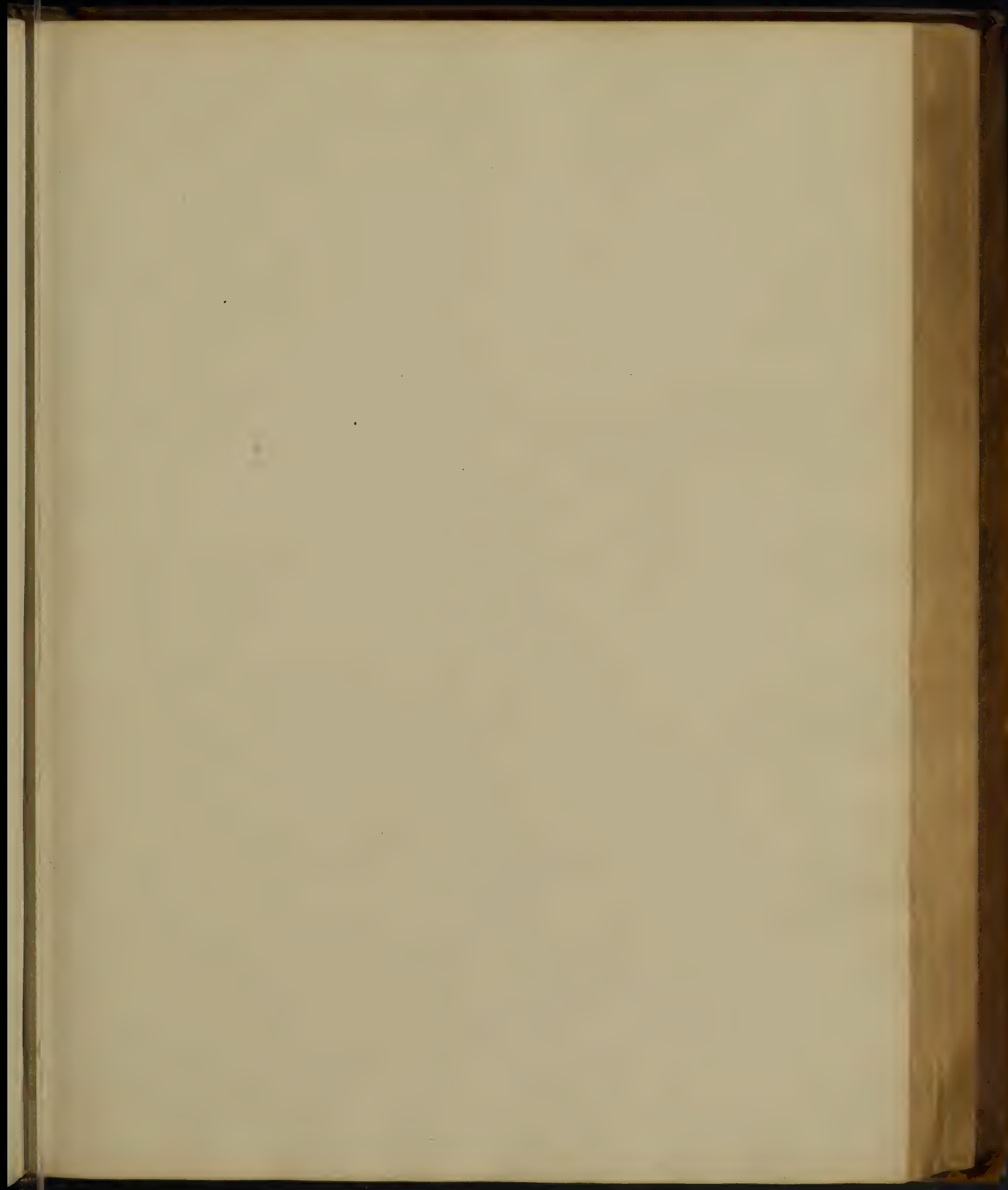




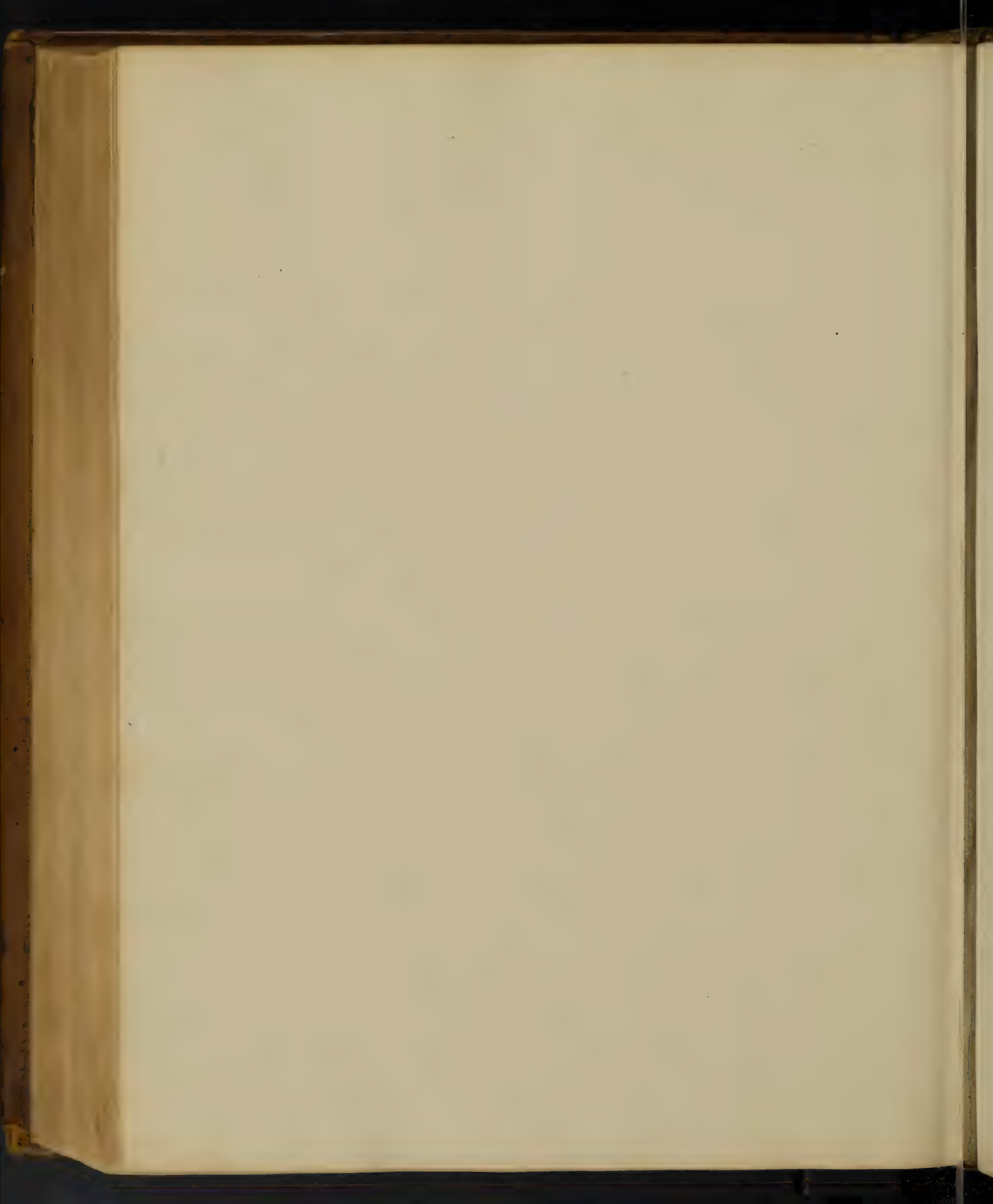


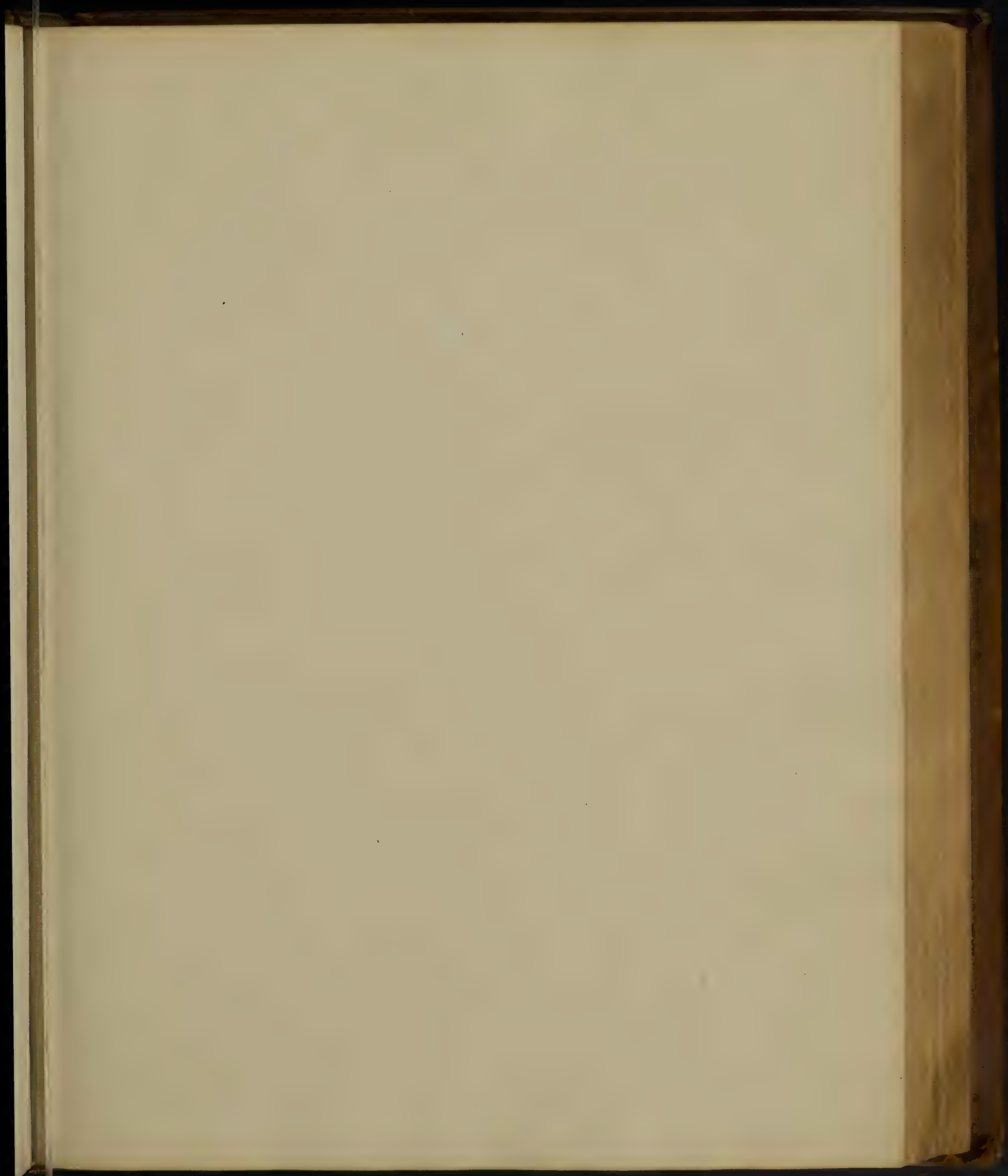




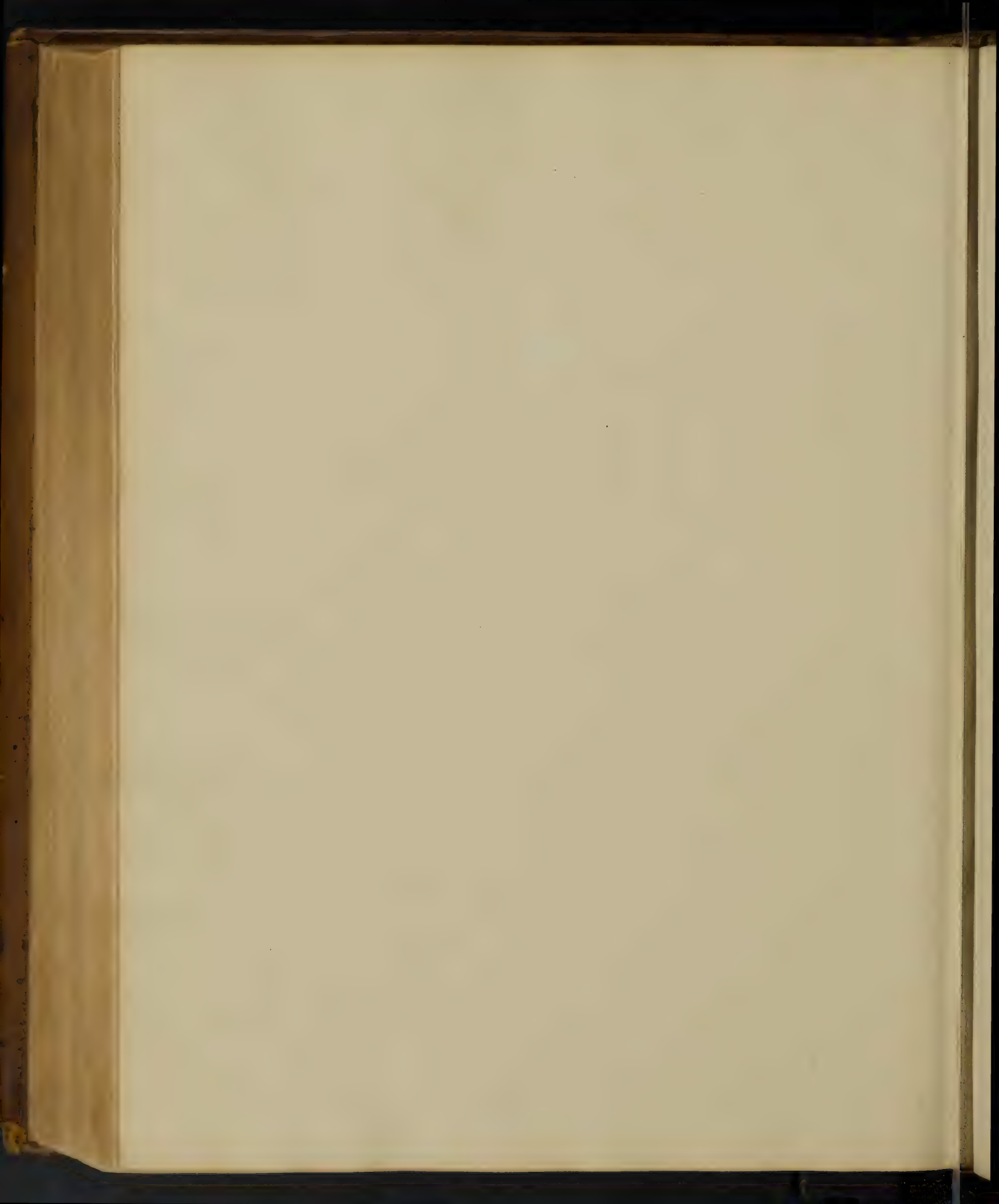


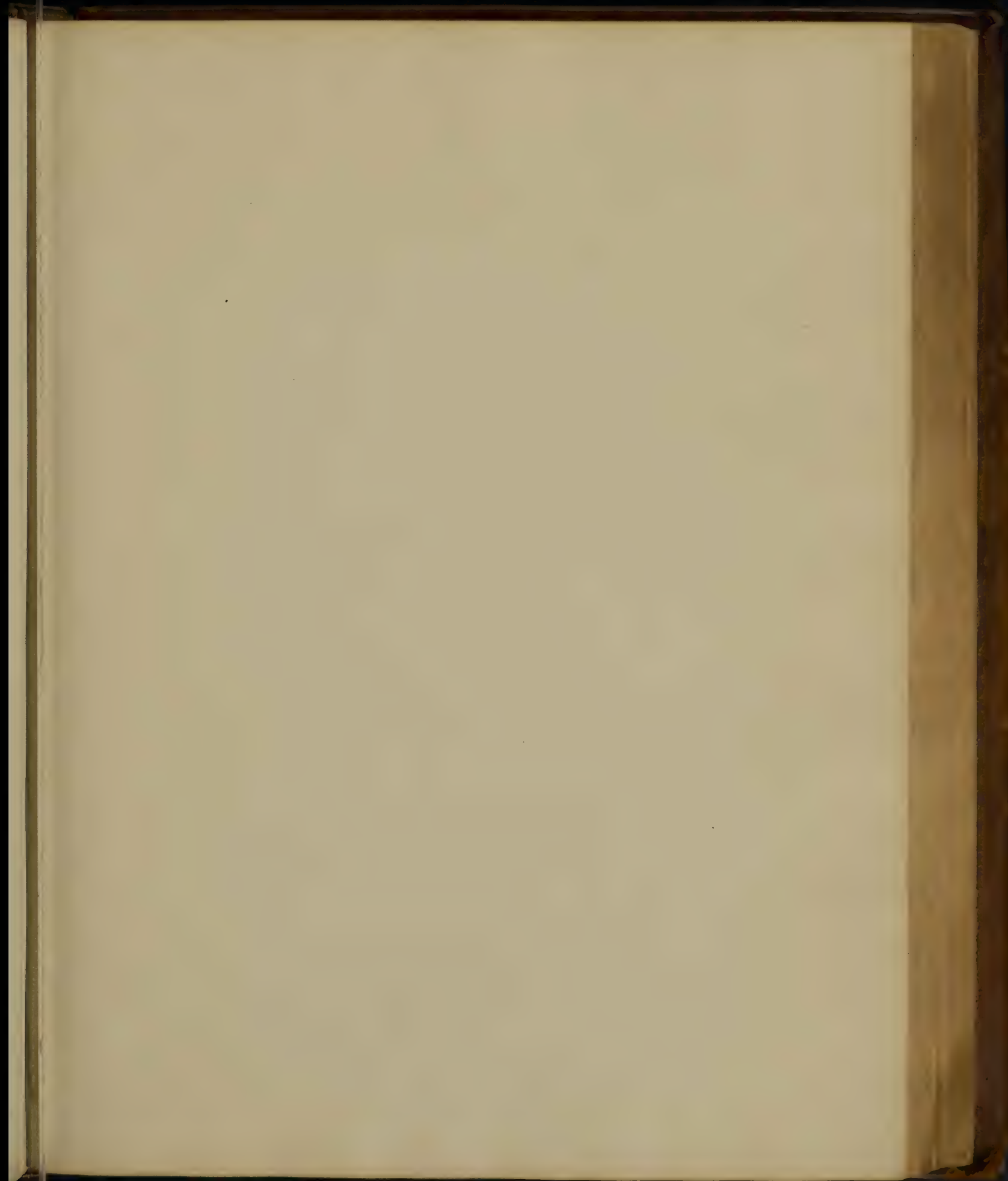




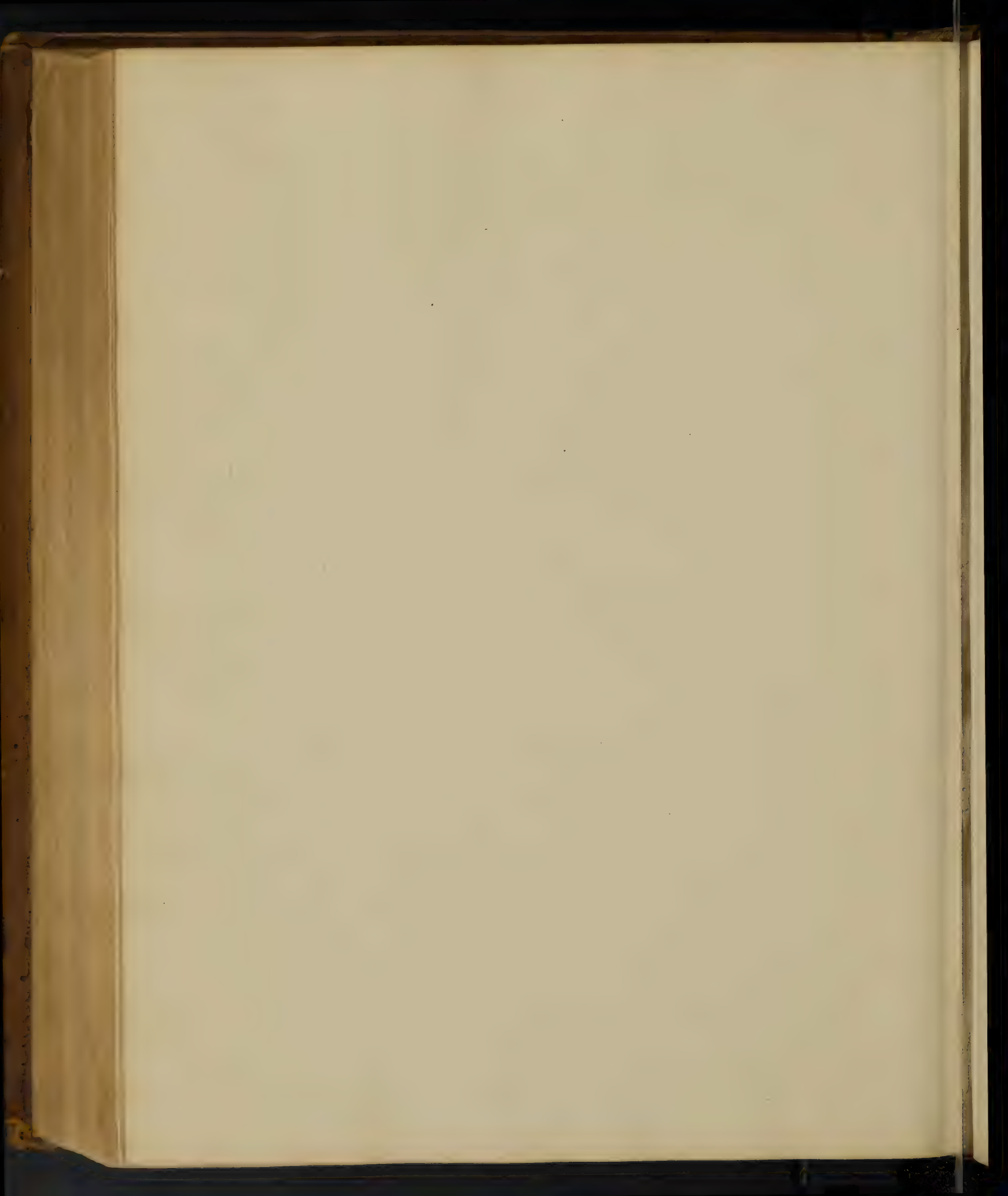


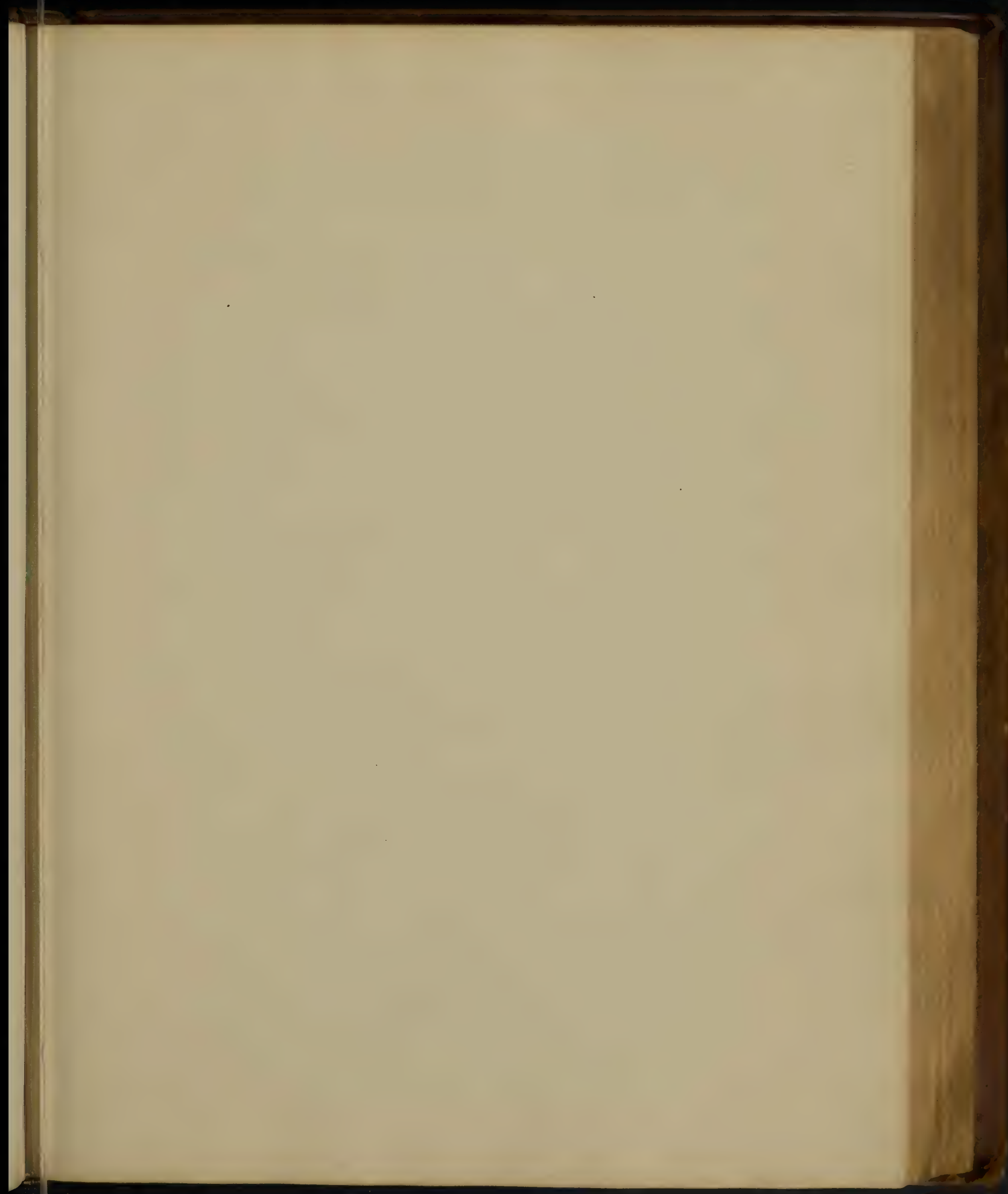




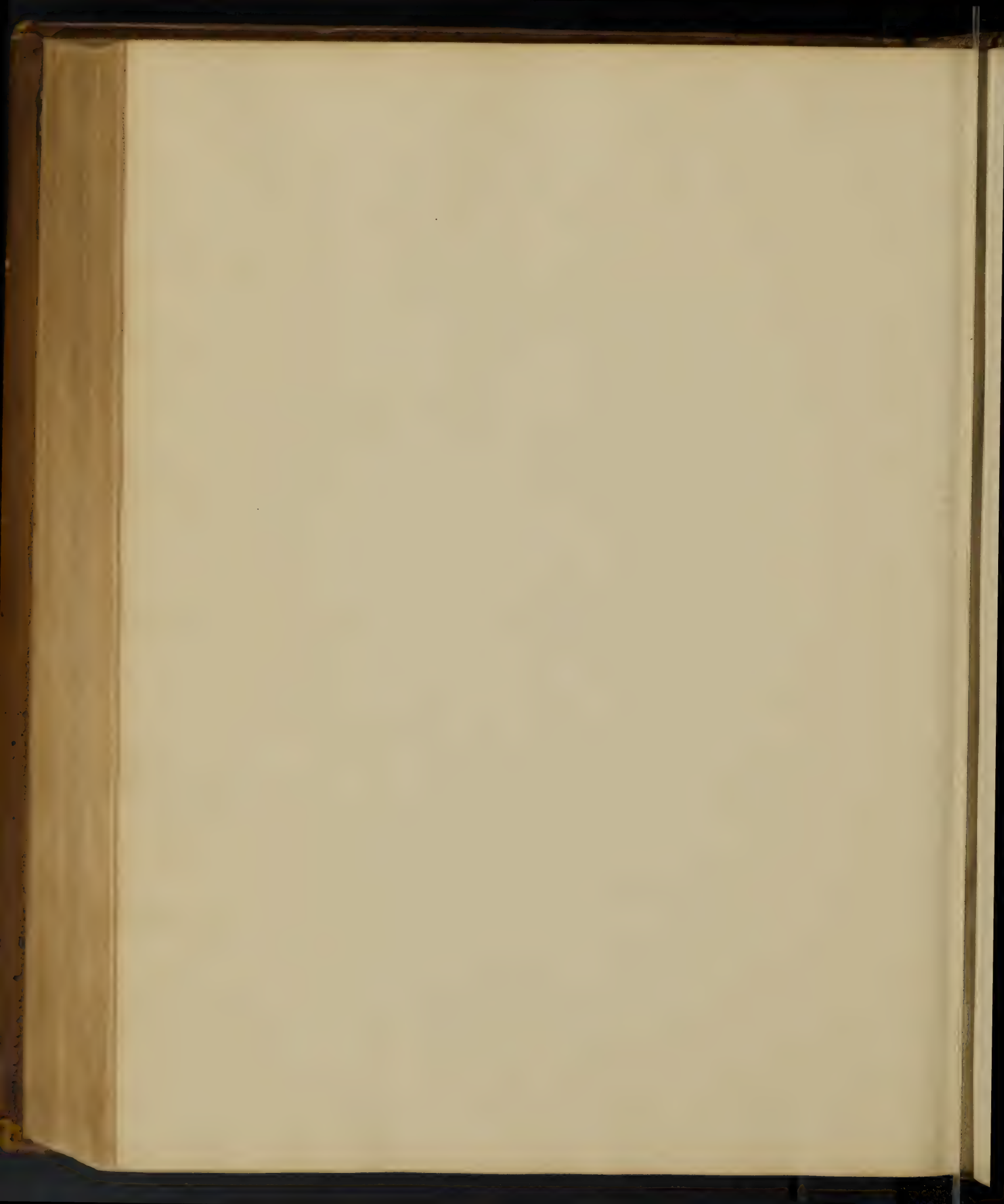


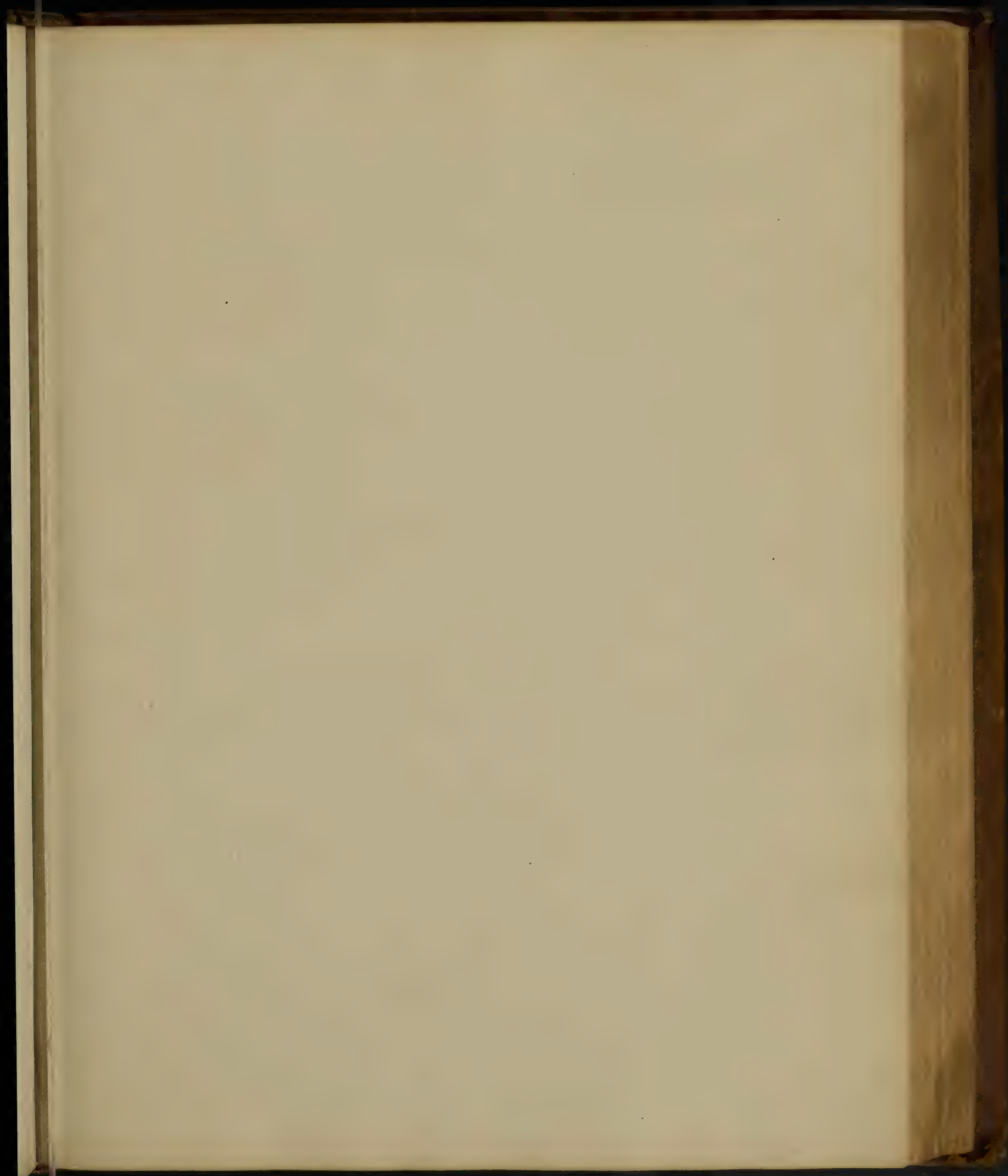




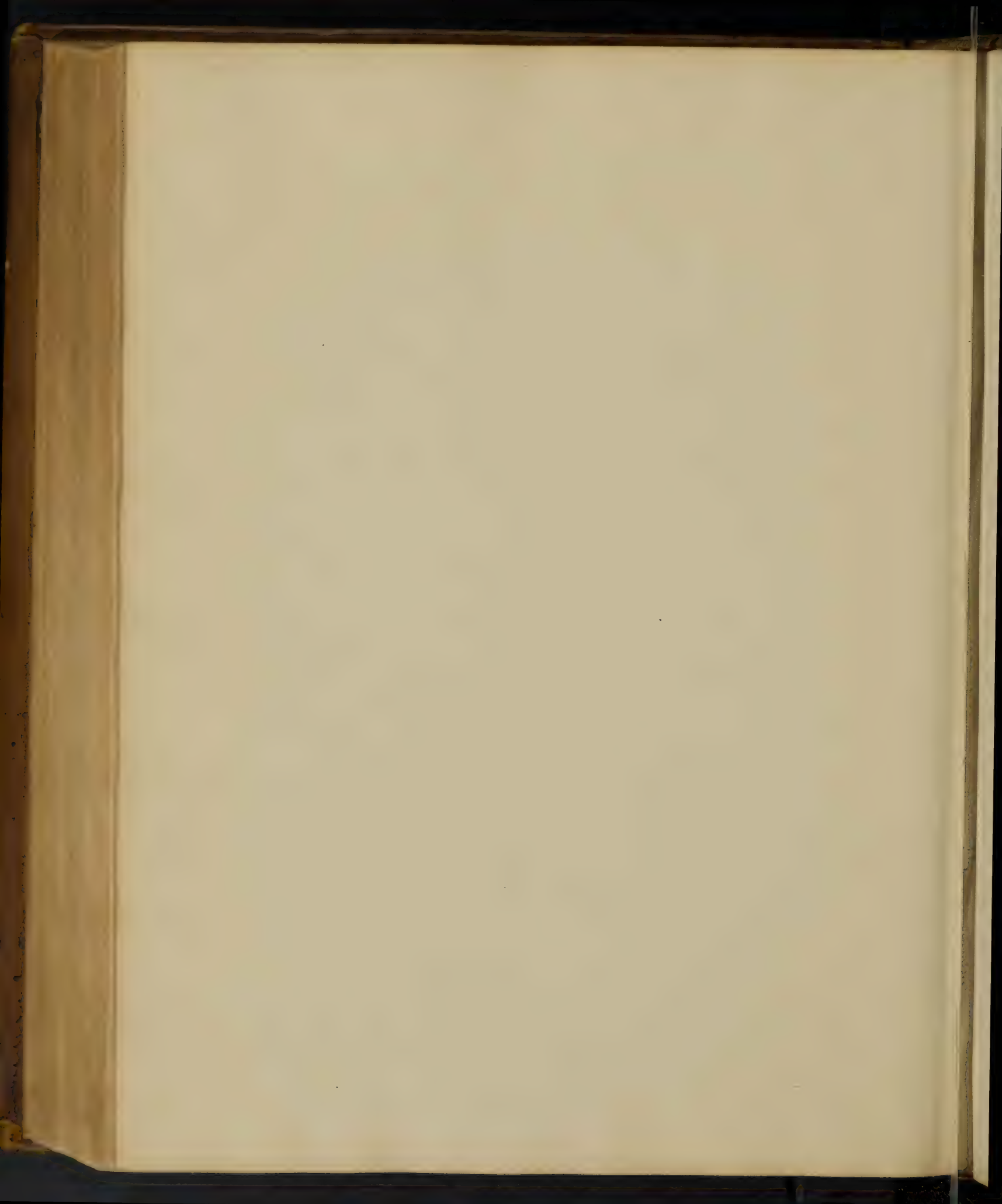


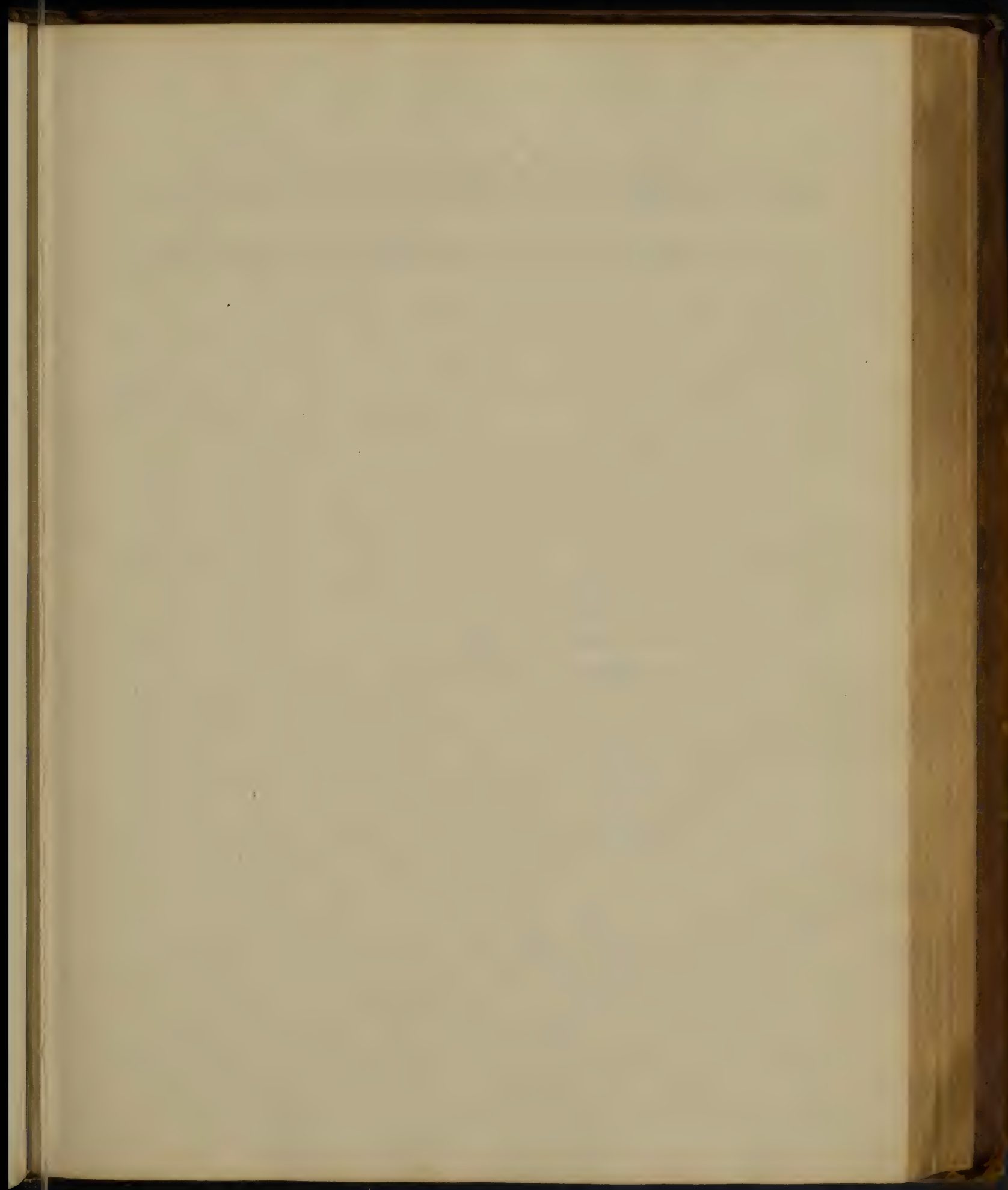
















# Executors & Administrators.

## Primary & General Observations.

This title will include, all the Law respecting Executors & Admin<sup>rs</sup> the payment of debts, the payment of Legacies, the manner of distribution, and all the Law respecting Wills.

When a man dies after having made a will, & appointed an Exec<sup>r</sup>, the Exec<sup>r</sup> at C. D. is invested with a legal title to his personal, but not to his Real Property. If no will be made, i.e. if a man dies intestate, then the Law has provided how the property is to be disposed of & the person appointed by the C. to perform this duty, is styled Administrator. There can be no Legacies where a man dies intestate. The Admin<sup>r</sup> has the charge of paying all debts. Executors & Admin<sup>rs</sup> are the representatives of deceased persons. They are under the direction of the C. If a will is made, this is the Law to the Exec<sup>r</sup>; their duties very much resemble each other.

The C. D. has established the mode of paying debts. The personal property is legally vested in them, but they have not the beneficial use. They are Trustees in the first place, for creditors, they pay Legacies finally to those entitled under the will of distribution: this trust they must fulfill.

Legacies cannot take without the consent of the



## Exors & Adminors.

of the Exor; for this person is liable to Creditors, and in "case their debts exhaust the personal funds the Legatee takes nothing. If the Exor. will not suffer one, who is entitled to a specific legacy to take it, it is a breach of duty; the Testator trusted him to pay it over; and in case the Exor. does not, the specific legatee may sue him & recover damages - but he can not recover the thing itself. If he consents to let the Legatee have it, that moment it vests in him.

In considering this title, there are several general maxims to be observed & kept in mind: One, without any exception is that Creditors must be inferior to Volunteers. "A man must be just before he can be generous." But it does not follow that the Exor or Admin must pay all the debts of a deceased; he is liable only as far as he has assets.

Assets are Goods & Chattels of the deceased which may be converted into ready money: from the French word "asset" - sufficient. An Exor or Admin must never pay volunteers, till all y. debts are paid. He may be liable in a devastavit for wasting y. assets. My object will be to point out to you the rules of the C. D. and these understood you will easily discover the variations from it introduced by Statutes in many several states.

By the C. D. Exors or Adminors have nothing to do with a deceased's debts - but then the Qu. arises, how are the debts of the deceased to be paid, provided there is not a sufficient y. assets. Suppose a man

## Errors & Amendments.

man dies leaving personal property sufficient to pay half of his debts & real property to twice as much. How are you to obtain property to pay the remaining half of the deceased's debts? There is a defect in the C.E. as to this particular. but it is in some measure remedied by a Ct. of Chy. The Real Property is liable in the hands of the Heir, to pay specially & bond creditors: by these I mean, when the Ancestor has bound his Estate by writing under seal, or by judg<sup>t</sup>. debts. But suppose there are no bond creditors, but they are all debts due by simple contract. now if there is a deficiency of assets, at C.D. there is no remedy - they cannot collect them out of the Real Property.

I have observed the Heir was liable to pay such debts, & not only at C.D. of his Ancestor, as were due by specialty. But the specialty Creditors are not bound to come on the Heir. they are allowed to come on him, if he has property & improve the personal Estate for the benefit of the simple contract Creditors, but if they are otherwise disposed they may come on the personal property & by exhausting that fund, utterly deprive the simple contract Creditors of any remedy at Law. But how they will interfere & let in the simple contract Creditors upon the Heir, as far as the specialty contract Creditors have gone upon the personal property. e.g. Suppose A.D. dies possessed of personal property to the amount of £5000 and Real Property to the amount of £10000 which goes into the hands of the Heir. now the specialty Creditors



## Creditors & Admirors.

Creditors will not go upon the heir but exhaust the 5000 £. the personal fund. But they will lie in the simple contract creditors upon the land, & compel the heir to pay them as much as the specialty creditors have taken out of the personal property. Suppose the specialty creditors had debts amounting to 25000 £. & this they had taken from the personal property (leaving 2000 £.) they w<sup>d</sup> have compelled the heir to have paid to the amount of 25000 £. to the simple contract creditors, as he was liable to pay the specialty creditors that much, had they notice of going up on the personal fund, come upon him. But suppose there are no specialty creditors, & there is not sufficient personal property to pay the simple contract debts. then the creditors have no remedy. they lose them. The principle of equity is, that they will lie in the simple contract creditors upon the heir for that amount & no more than the specialty creditors might have recovered from him. (Of course the heir, if there are no specialty creditors, or if there is & they do not go upon y<sup>e</sup> personal property.) is not liable to pay the simple contract creditors one cent.

The Laws in the different States in y<sup>e</sup> U. S. generally remedy this C. S. defect, & lie in all the creditors upon y<sup>e</sup> heir, in case there is not a sufficiency of <sup>assets</sup> ~~debts~~ to pay their debts. Some Statutes give the Ex<sup>r</sup> in such case with power to sell y<sup>e</sup> Land - and even compelling him to sell it, if he has not assets sufficient to pay all debts. In some States

## Exors & Admors.

States the Creditor is permitted to sue the Heir. But in Conn. & in some other States they have nothing to do with the Real Prop<sup>y</sup>, until there is a deficiency of assets. You will then remember the Eng<sup>l</sup> principle, that the Specialty Creditors are never obliged to go upon the Heir, but in case they do not the remedy is <sup>in</sup> Chy by marshalling the assets.

Assets are of 2 kinds 1<sup>st</sup> Personal assets, which go to the Ex<sup>or</sup>, and 2<sup>d</sup> Real assets which go to the Heir: there is also another distinction, Legal assets and Equitable assets. Legal assets are

There is certain property which never can be got at without going into Chy - these assets are called equitable. Legal & equitable assets are governed by different rules. The Qu. is this? Can you get at this prop<sup>y</sup> without going to Chy? If you can not they are equitable assets - if you can they are Legal. This frequently happens as when the Ex<sup>or</sup> refuses to sell real prop<sup>y</sup> to pay debts, as directed by the Testator. Suppose A. dies owing £10,000. he leaves prop<sup>y</sup> sufficient to pay all his debts, viz 5000<sup>l</sup> Legal assets, and orders his farm to be sold to pay the remaining £5000: but the Ex<sup>or</sup> refuses to sell - now there is no power by Law which can compel him to do it - but Chy will compel him for they will lay him under a heavy penalty, &c.



## Exors & Admin's.

be forfeited in case of nonperformance. But then if the proceeds of the sale of the Land is not sufficient to pay the debts, no species of creditor shall be preferred to another - debts when paid by authority of a Ct. of Chy. are to be paid equally & proportionably. Suppose then in the above case there are 3000 £ debts & the Land falls for £4000. now if the C.S. rule of precedence was to be observed, & the specially Contract creditors paid first they w<sup>d</sup> take all, & the simple Contract creditors lose all their debts. but Chy direct the debts to be paid pari passu, allowing none to have a preference. The rule is that if you must go to Chy. to obtain your debt, the money there obtained is equitable assets. So if J.S. dies leaving no property except an Equity of Redemption now at Law this is not worth anything but if application is made to Chy by the creditors they will order it sold. and if the amount of the Sale is sufficient to pay all the debts, they will all be paid but if not, the Ct will strike an average, & pay an equal proportion of each one's debt whether due by Specially or simple contract. Thus you see what a Ct. of Equity may do to aid the deficiency of the C.S.

I now notice to you the great duties of Exors & Admin's. The Admin<sup>r</sup> is to pay the debts, and then pay the residuum or surplus of the property according to Law. The Exor likewise is to pay the debts, & then the Legacies. but suppose there is a surplus

( )  
WILLS & ADM'ORS.

surplus, & no residuary legatee appointed by the will to whom does it go? Why the Exor has the legal title to this residuum, no one has an equitable interest, of course he having the best title will take it. The Testator directs how his property should be distributed, & that the Exor sh<sup>d</sup>. pay it away in a certain manner, but said nothing about this residuum, and therefore at C. D. the Exor is entitled to it. But an Adm<sup>r</sup> is not entitled to any residuum, in fact there can be none, as the Ex<sup>r</sup> has directed how he shall pay it over. I said above that at C. D. the Exor is entitled to y<sup>e</sup> residuum, but when there is a legacy left him, Chy interfere & say it was not the intention of the Testator sh<sup>d</sup>. take y<sup>e</sup> residuum, & therefore they will direct him to pay it over to such person or persons as w<sup>l</sup> have been entitled to it provided the Testator had died intestate. But if the Exor has no legacy left him, then Chy will not interfere, but he will be entitled to it as th<sup>e</sup> compensation for his services. for by the Eng<sup>l</sup> Law an Ex<sup>r</sup> is allowed nothing for performing the duties of his office. Suppose a specific legacy is given him, this does not cut him out of the residuum. but if a legacy of a sum of money is left him, this Chy suppose was intended to be all the compensation the Testator intended to make him for his trouble. y<sup>e</sup> Parol proof however is admissible to show the intention of the testator - that he had declared in his



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his life time, if there should be a residuum, that for  
sh<sup>d</sup> have it, notwithstanding the Legacy he had  
left him. In such case the wife allow him to  
retain it. But now ask, is it not contrary to the  
known principles of evidence to admit this parol  
proof? No, the rule is as well established that you  
may introduce parol proof to rebut an equitable  
presumption or claim - as it is that you cannot  
introduce it to rebut a legal presumption or claim.

Originally the office of an Exor or Admor  
was unknown - on the death of a person, his  
property vested in the King as paterfamilias -  
he had the legal title. What was done with the  
property? Why there were certain rules by which  
it was to be distributed - a part of it was to pay  
debts - a part of it was to go to the widow & chil-  
dren - and a part was to be applied to pious uses.  
As the King c<sup>d</sup> not personally attend to this office,  
his power was delegated to the Ecclesiasticks - they  
being the most pious, were considered as the best  
keepers of the Kings conscience, & therefore  
it was the distribution of dead mens estates  
was put into their hands - this was a source of  
much mischief - they abused their trust - a part  
was applied by them for the endowment of their  
monasteries - another part to pay the spirit of  
the deceased out of purgatory (tho they well  
knew that if Beelzebub ever had him or his estate  
they might pray to all eternity without one single  
soul

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iota of effect.) a part was frequently employed and applied to private purposes and no part was ever given to the Widow, children, or other relations. An act was then passed, directing the Bishops to pay the debts, & distribute the property. This was troublesome to the Ecclesiastics & they applied to have Exors appointed, and they themselves were constituted the Ecclesiastical Exors. When a man made a will, and appointed an Exor, he had the same authority as an Exor who is the Deputy of the Ecc. Ex. or Ex. of Probate here. 1<sup>st</sup> the Stat. directed the Ecc. Ex. to appoint the next friend of the deceased, as Adminor. under this vague term the Ex. generally appointed the near relations as wife &c. but not being compelled to appoint the near relations they abused their trust. and another Stat. was made in the 31 Edw. 3<sup>rd</sup> which is now obsolete. Then the Stat. 21 Hen 8<sup>th</sup> was made directing the Widows or next of kin, to be appointed Adminor. Now this may be in proper persons, or there may be several in equal degree, all claiming to be next of kin in such case the Ex. in their discretion may appoint whom they please. This term "next of kin" is not considered so strictly a narrow collectivism. When there are more than one who are in equal degree, the Ex. may appoint one or all to be Adminor or Adminors. If next of kin is a proper person, & not disabled or disqualified then must appoint him. (see "Baron's Case" to find out who is next of kin.) All our Statutes are copied from the Stat. 21 Hen 8<sup>th</sup> and in all cases where there is no



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disqualification the next of kin must be appointed. The Eng<sup>l</sup> mode of computing is according to the Civil Law, to find the next of kin. Some say we sh<sup>d</sup> appoint according to the C.D. mode of computation, but Judge St. is clearly of opinion that the mode according to the Civil Law is correct. This mode was thus established: The Eccl. Cts. always computed according to the Civil Law they had a great aversion to the C.D. But why sh<sup>d</sup> we adopt it here? The reason is plain - we make a Stat. copied from theirs, and thus an implied Legislative request is given to compute as they do, according to the Civil mode. Suppose a Stat. says a man may bring an action of Trover ~~to~~ another who sh<sup>d</sup> 3000 ~~or~~ 500. We do not know what Trover is, but we can find out by looking into the Eng<sup>l</sup> authorities and therefore we sh<sup>d</sup> consider it according to their idea of it. Unless we follow this mode of computation, we shall be thrown into utter confusion. The manner you will ascertain the next of kin in the Civil Law, or who the Law intends shall administer the Estate, is very easy. The Ancestor by the Civil Law is the Terminus from whom the several degrees are numbered. In Custom the descending line is always to be preferred to the ascending line, or next of kin in a collateral line. Thus A. B. is the terminus, he has 2 Sons, & Grandsons and 2 great grand sons. here his Son A. is the nearest entitled in the first place, after them his Grandsons, & after them his great grand sons.

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But suppose he has no descendants at the time of his death. then you must take the ascending line, here it likewise easy to ascertain who is entitled? Now suppose all in the ascending line are dead then we come to the collateral line, & to determine who is entitled, you must count up to the common ancestor, & then down to the collateral line. e.g. Suppose J. T. has an Uncle George, and also a nephew Peter, his brother Sam's son. the uncle & nephew are related in equal degree, and the Court may appoint which they please, or both. They may say, George is a stupid old fellow, and Peter is a smart active young man, we will, therefore, appoint him. or they may say Peter is a young fellow of a lad, & George is a steady man we will therefore appoint George Adminor.

### Senr. observations continued. Sect. 2<sup>nd</sup>

When you have found the next of kin there is no trouble in distributing. But the Stat. says next of kin, & "Legal Representatives". In some of the States the words Legal Rep<sup>s</sup> have been omitted in their Statutes. The words Legal Rep<sup>s</sup> are understood though some of the next of kin are alive, & some dead leaving children. these children are legal Rep<sup>s</sup> for these words never come in when all the stock are dead. This is very important. The distribution among the children is per capita not as large parts their parents will have taken. Suppose part of the stock are removed leaving children and part of the



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Of stock are remaining they then take per stirpes. the children take the parts that their parents w<sup>d</sup> have taken when next of kin they take per capita. when they take as next of kin they take per stirpes. This is the rule.

I have observed that after Admins. were first appointed the creditors then had a right to an action. but even then there was no provision made for the widow & children out of the residue after paying debts. The widow & the fatherless excited no compassion in the breasts of the Bishops. the state provided however that they sh<sup>d</sup> be done. but there was no remedy. for admin. instructions were appointed by the Ecc<sup>l</sup>. Co. and the Gov<sup>t</sup>. were held in subordination to the Clergy, under the spiritual power of the Sec<sup>y</sup> of Rome. When the Exors were appointed, they were obliged to follow the same course. and the evils of this unjust method of proceeding became so enormous, that when the Law was raised the Ecc<sup>l</sup>. Co. (as yet to tell) determined there was no remedy. Then the Stat. 22 Car 2. was made & by it the rights of the widow & children were established. This Stat. is generally adopted in all the States. So that nearly by the thorough understanding of it no person will be at a loss to distribute Personal Property.

I observed that volunteers take nothing. All creditors are paid no matter on what form they appear. for if they are volunteers they must be paid. by Suppose A. B. before his death enters <sup>into</sup> a bond

## Exors & Admins

with his son Sam, without any consideration. the payment of this bond must be postponed till debts are paid but is to be paid before other volunteers. The remaining volunteers are to be paid all alike.

Legacies are vested in the Exor in the first place & not in the Legatee. It is not so with Real Property - it vests in the Devisee so instantly that the Devisee dies and he may maintain an action of trespass against any one who commits a trespass upon it. If there is no will the Real Estate vests in the Heir & personal property in the Adminr.

With respect to Lands devised to be sold to pay debts, they vest in the Heir, unless specially vested in the Trustee. When Lands are devised to be sold by the Exor, they cannot compel him to sell without he pleases to accept of the trust. but if he does accept, they can compel him to perform the trust.

There is one case where a Legatee need not come upon the Exor for his Legacy. Suppose a man devises his Real Estate, charging the Sons with the payment of Legacies. Now if the Devisee accepts this devise he must pay the Legatees. In all other cases, a Legatee must sue the Exor in a Ct. of Chancery.

The Exor's liability is to the extent of assets in his hands this is not to the amount of the personal property left in his hands. but to the amount for which this personal property sells. Suppose the



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property is worth £3,000 but it only sells for £2,000. now this latter amount is the assets.

Suppose the Executor has been guilty of fraud or negligence then he is liable to pay the deficit of assets and is liable to an action of Treaspass, called *Actio de vastavit*, in favor of creditors. He is not liable for slight neglect nor for his misjudgments as if he refuses a price offered, on the expectation that it will rise in value - but instead of this he falls. He is liable for gross negligence. An Executor's liability depends on his personal conduct. The body of the estate is not liable, nor is he liable for costs!

There is a proposition in some Books that if a Testator leaves a debtor his Executor, this discharges the debt. The maxim was then understood literally, for it was considered absurd if an Executor should sue himself, and no other person could sue for debts due the testator. Therefore the debt was extinguished. But the creditors may sue him for this as assets in his hands and so may the Legatees. But if he has paid all the debts and Legacies, & no one remains unsatisfied, the debt is extinguished - on the ground that he is entitled to the residuum.

There is a distinction between pecuniary & Specific Legacies - by pecuniary Legacies is meant, such as are to be paid in ready cash. A Specific legacy is one consisting of a specific article -  
as

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as a Horse, a carriage, a watch &c. Suppose I say I give my son A.D. a bag of guineas in the upper drawer. Now this is a specific legacy - a pecuniary one is a Legacy which can't be identified as a Legacy of \$500. This is to be made up out of certain profits but you cannot identify it. Specific legacies are to be paid before pecuniary if I say I give my Horse &c. A.D. will take the Horse tho there is not a cent left for the other legacies.

If there is not prop<sup>y</sup> sufficient to pay all the pecuniary legacies, they abate in proportion. If the specific legacy is destroyed it is lost to the legatee as if the Horse dies. He cannot claim an equivalent in any thing else.

Legacies are also divided into vested & lapsed. A vested legacy is explained by its plainness a lapsed legacy - a Legacy may be lapsed in two ways. as when the legatee dies before the testator, it then goes into the residuum. But there may be a lapsed legacy tho the legatee outlives the testator. as if the legacy is given to A. L. to be paid when he arrives at 21 years of age. now if he dies before that time it is lapsed. but if it be given to him to be paid when he arrives at age, it is a vested legacy. and if the legatee die before that age his personal Rep<sup>ts</sup> will receive it.

A donatio causa mortis is a specific present made by a person in contemplation of death. It is always conditional, for if the donor recovers



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The donee is not entitled to the property. This is no part of the will, nor has the Exor anything to do with it. This gift is never good, as creditors if it be wanted to satisfy debts tho it is good as the donor's representation & credit. This will be fully explained hereafter.

Having now finished my preliminary observations, I hasten to proceed to the general title.

Executors & Administrators are the representatives of deceased persons. i.e. as to their personal estate, & their duties which affect it. Co Litt 209. 2 Bac 439. 1 Horn Di 139.

The Executor is a Representative as above mentioned appointed by the will of the deceased i.e. the last will. But Exor his duty is to execute this last will.

We are to be that the appointment of an Exor is absolutely necessary to constitute a will. But this is not so. says Judge Keene. Co Litt 111. Hawk 281.

At. C. D. a testamentary disposition of lands without naming an Exor was called a will. But such a disposition of chattels was then called a Testament. Co Litt 111. 5. Bac 497.

There may be a will & yet no Exor named. When I am saying this, I do remark that I shall not observe the technical difference between a will & a Testament, but shall call them all wills. If there is no Exor named, the test (the appoint (ion) is) must appoint an, exor testaments annexo. and he <sup>differs</sup>

## Exors & Admors.

differs but little from an Exor. he is as much bound by the will as an Exor appointed by the Testator would be.  
2 B.C. 507.

To constitute an Exor it is not necessary that any technical words be used as to say "I nominate & appoint A. my Exor." If the words had been "I commit all my goods to the disposition of A." it would be sufficient. The intention of the testator to make A. his Exor is sufficient, if that intention is apparent. In Wills, technical words must always give way to the intention of the testator. If that intention be not inconsistent with the rules of Law, indeed the intention regulates the will. Suppose a man by will give an Estate to A. & "his issue," now a fee simple will pass under these words but of such words were used in a Deed it would only create a life Estate in A. & it not descend to his Representatives.

or in Law the word "heirs" is indispensable to pass a fee simple. Again suppose the Testator says, "I give I. S. and I am worth." now this carries all his Lands, but if such an expression were used in a Deed the Lands w<sup>d</sup> not pass by it. Therefore you see the intention is to govern. But if the Testator were to give I. S. his Estate in fee simple on condition that he never w<sup>d</sup> sell it. here the condition is void, the intention is not to be regarded, for it is inconsistent with the rules of Law, that I. S. sh<sup>d</sup> not be at liberty to give a fee simple Estate. Com 234. Dove. 177. 13yn 90<sup>th</sup>. 1 Vent 3. 12. Plow. 281. Co Litt 111. 2 Bac 342. Godolph. 82. 2 B.C.



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A disposition of personal property in contemplation of death, not containing the appointment of an Exor is called a Testament, and is to govern in the disposition of the personal property of the deceased. In some of the States it is called a Codicil: Thus there may be a will without a Testament & vice versa. S. c. 2. 2 Bac 39. 3 Ab. 466. Wentw. Off. ex. 2. 508. 27.

Naming a man as Exor. is by implication a gift to him of the goods of the deceased, he being bound to pay debts. and so naming an Exor. makes a will. 2 Bac 392. Wentw. 3. 508. 92.

Admors like Exors are the representatives of deceased persons - but Admors are appointed by Law, tho its proper organ - they are appointed in 4 cases viz. 1<sup>st</sup> Where there is a Testament without appointing an Exor.

2<sup>nd</sup> Where the person appointed as Exor cannot act, for some reason, as if he were only 10 yrs old.

3<sup>rd</sup> Where he will not act as such - &

4<sup>th</sup> Where there is no will - i.e. where the person dies intestate. 1 Com 257. 2 Bc 507.

Exors & Admors are considered in Law as Trustees, to those who are entitled to the personal effects of the deceased - & hence the jurisdiction of Ch in cases of mere personalty between Exors & Admors, & the next of kin. 2 Equities 4<sup>th</sup> 1 P. W. 331. 3 Atk 526. 3 Bac 28.

You see then what are Exors & Admors. An Heir is the person appointed by Law to succeed to the Estate on the death of a ancestor. 2 Bc. 204. A Devisee is a person appointed by will to take the Real Prop. 3 Bac 466. A

## Exors & Adm'rs.

A Legatee is not entitled to personal property by testamentary appointment. Devisees and Legatees are frequently used synonymously in goods. Co. 271.

The powers of Exors & Adm'rs over personal estate is merely that of Trustees, except so far as they themselves are interested, i.e. are entitled to it. Over Real Estate they have no control as Exors or Adm'rs, for Real Estate was not originally testamentary. An Exor however may have the disposal of Real Estate like any other person, by express appointment of the Testator. An Exor then can only acquire Real Estate by appointment - it does not follow that he has any more right than another individual because he is named Exor. So if bound by a bond for the payment of debts, the Exor is considered in Law as the proper person to sell, no other being expressly empowered. 3 Bac 392. 1 Vent 34. Lovel. 21. 23. 1 Atk 420.

But an Adm'r as such, has in no case any such power, & neither of them has any right to the Real Estate, as Real Estate in any case.

A Legatee receives his legacy through the Exor - but a Devisee takes possession without the intervention of the Exor. How. 225. 2 Bac 487. Vent 27. 29. Dyar 254.

There is no Law in the U. S. exactly like the E. L. with respect to the Exors liability in the disposition of the Devisee & their taking of personal property.

Remember this principle. That the personal property is, by Law, chargeable with all the debts of the deceased. That the Testator shall otherwise direct to



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to sell his lands to pay his debts yet if that is not sufficient the personal property is liable. The real property is liable but only for debts of record debts by specialty. Of course the Exor has no disposal of the property which he has it by appointment under the will. If the Testator orders his land to be sold & no person is mentioned or appointed by the will to sell, it is the duty of the Exors to sell, and it is the same if the lands are directed to be sold for the payment of debts. The following construction has been put upon a will in Eng<sup>d</sup>. viz. if the testator devises lands for the payment of debts, the land is only an auxiliary to be used in case the personal property should fall short. In Canada & several other States it has been determined that the lands should be sold to pay the debts in the first instance, and we may naturally suppose this was the Testator's intention. Dom. 93. 2 Mc. 3 Mc. 1 Stk 420.

As to judgments binding on real estate, judgments bind real estate from the first day of the term in which judgment was rendered & goods & chattels from the day of the execution. But now by the Stat. 29. Car 2<sup>d</sup>. they bind the lands as bona fide purchasers only, from the day on which judgment was signed & goods & chattels only from the delivery of the execution to the officer. According to the 10<sup>th</sup> Stat. judgments bind lands in the hands of the heir, from the time of the original writ purchased. 3 Mc. 3 Dec. 26.

Specially creditors may resort to the Real or  
pers.

## *Exors & Admors.*

personal property as they please i.e. to the personal property or Assets in the hands of the Exors, or to the Real Estate in the possession of the Heir - if they come upon the pers. property, it be not sufficient to pay all the debts, the Simple Contract Creditors are liable to lose all their demands as the case may be, without any remedy at Law, since they cannot take real estate, & are postponed to specially Creditors. 200c. 93. 2 B.C. 3 B.C.

Specially C. to be sure may apply to the Heir, if they do the Simple Contract Creditors may be paid out of the personal property, but if the specially Creditors come in w. personal property they will relieve the Simple Contract Creditors by letting them in upon the Real Estate, for so much as the specially Creditors have taken of the personal property. 2 Alb. Cas. 30, 1 Hy. Cas. ab. 44. 2 Chy Cas. 45.

And hence the Simple Contract Creditors stand in the place of the specially Creditors as to so much of the Real Estate. You ask how the remedy is given? Why it is thus. A Ct. of Equity will order a sale of the Real Property in the hands of the Heir to that amount, and the same indulgence is given to general Legatees. If the assets of the sale are insufficient an arrangement is to be made. 2 Alb. 416.

I have observed that Creditors are preferred according to their rank, but this is not all. Say there are 4 Bond Creditors in equal degree, now he who first obtains his judgment is the Exor is entitled to his whole demand, to the exclusion of all others. This is pre-



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prevented in Court. & some other States by Statutes there can be no voluntary payment in this case, <sup>by</sup> the Exor. or Adm. he is liable. 3 P. Wms 401.

If there are 2 Creditors in equal degree & they call on the Exor he may pay which he pleases. but if one of them has brd. a suit <sup>at</sup> Law, or bill in Chy, as the rule now is. the Exor cannot defeat the claims by voluntarily paying the other. If he pays the other he is personally liable. but when one of them gets judgment <sup>at</sup> Law, & comes on him, he must pay him. Talb. 217. Bro. Parl. Cas. 287. He may pay himself in preference to others in equal degree.

If Lands are devised to an Exr to pay debts the Exor. cannot, for that reason be sued at Law, by a creditor as having assets. nor is it in the power of a Ct. of Law to compel him to make sale of the Land. not being considered as assets in his hands. But Chy will interfere & compel him to sell & that the the devise were to no particular persons, but money directed to be sold to pay debts. In this case then they are equitable assets & he pays all creditors alike. But by C.D. he might pay any creditors i.e. where their debts are of equal degree & no suit is commenced, for this Land did not come to him by a legal course. 2 P. Wms 416. 2 Vern 106. 1 Com 401. 1 Rose 720. 1 Atk. 420.

## J. Assets.

Assets are all such property of the deceased, as his personal Representative takes, which may be

## Exors & Admins.

converts into ready money, for the purpose of enabling him to discharge those duties which devolve on him as a Representative of the deceased. Of Assets there are several kinds as 1<sup>st</sup> Real i.e. such as descend to the heir, for such debts of the Ancestor claims upon him as bind his Real Estate, and 2<sup>d</sup> Personal i.e. such property of the deceased, as comes to the Exor as such, and makes him liable to Creditors & Debtors. 2 Dec. 45. 1 Com. 378. 379. 318 ac 32. 3 Mod 254. 3 Rev. 286. Carth 127.

Again Assets are either Legal or Equitable. Legal assets are such as go in a course of Administration i.e. according to the order or priority of Debts. Equitable assets are such as are distributed among all Creditors - they are pro rata pro pari passu all alike whether of high or low degree. Pow. Mort. 125. 129. 181 Com. 430. 3 H. 341. 1 Cr. Ch. 179. 276. 36. 412.

An Equity of Redemption, of a Mortgage in Fee is equitable assets, for at Law the whole Estate is forfeited. So an Equity of Redemption in case of any mortgage whether in fee or not, is equitable assets; but in case of a mortgage in fee, the mortgagor has no other than an equitable interest, because there is no reversion after a fee simple. Remember this Rule, that whenever you have to go to Ch; to obtain your money it is equitable assets. 3 H. 294. 3 P. Com. 341. 3 Bac. 33. Pow. Mort. 124. 1016. 61. 1111. 411.

But if Lands in fee be mortgaged for Years, the reversion in the mortgagor is Legal as well - and the Creditors may have judgment as the heir.



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of the Mortgagor of assets *quando acciderent* i.e. there is a stay of execution till revision comes into possession. 1 Cow Mort. 125. 1 Burr 410. Salk 353. 4. 2 Atk 294.

There is a contrariety in the authorities as to the quality of assets, arising from the sale of Lands, devised to be sold the more expressly for the payment of debts, whether they be legal or equitable. The difference is this. formerly if Lands were devised to be sold by an Executor to pay debts, it was legal assets. but when devised to be sold by any other person they were equitable assets. But this is not now the Law. they are now equitable assets in both cases. old authorities, viz. 1 Lev. 244. Hardw. 405. 1 Burr. 63. 2 St. Tr. 1416. 2 Vent 133. 4. 2 Atk 50. new rule ut supra. see 1 Bro Chy 135. 6140. Co. Litt. 112. note.

Money raised (as above) by Trustees is equitable assets, by reason of the exclusive jurisdiction of Chy over proper trustees. 2 St. Tr. 416. 2 Vent 133. 4. 2 Atk 50.

But still remember that when Lands, charged with payment of debts <sup>to</sup> come into the hands of the heir by descent, & are not devised: i.e. when the interest does not pass by the devise they are legal assets. for the Statutes & fraudulent devises have given the specialty creditors an action of debt at Law & the heir of the obligor. therefore the specialty creditors can obtain their debt without going to Chy. as they are legal assets to pay them. As when a person died, his specialty creditors might come on the heir & take the land for such time as would pay the debt. he could not take it in fee. But in case they were devised

## Devisors & Admors.

devisors, then formerly, were not liable in the hands of the devisees. But now by Stat. they are more liable & may be taken, & therefore they are legal assets. 3 Bar. 27. 33. 2. 11k. 293. 3 Ab. 630. Glan. 1270. 2. 131. 10. 11. 438. 2. 11. 410.

In conformity with the above rule it has been holden that money arising from the sale of lands, under a bare power to sell for the payment of debts &c. should be legal assets, because the land descends, the descent not being broken. but it is otherwise if the interest pass by the devise. 1 At. 180. 3 Ab. 300. 6. 11. 436.

This distinction is explained on a rather easy way by Lord Thurlough, who held that the descent was broken by a power to sell as much as by a devise to sell, carrying the interest by proper words. 3 Bro. Ch. 435. 135. 137. 140. Co. Litt. 112. 113. 2. 11. 236.

If lands on the Testator's death, descend to the heir, & other lands go to a devisee, these lands descending to the heir are to be applied to the payment of bond debts, before those specifically devised can be taken. If lands are devised for the payment of debts, it is otherwise the rule is reversed. 3 At. 556.

If the Testator in his will does not direct his lands to be sold, but charges a debt on his heir, then the heir is bound to pay it if he accepts of the land. But suppose the creditor will not come on the heir, but resorts to the personal property & asks that further more what is to be done? & then the law must come



## Universe. Sum or.

come upon the heir to the amount taken by the Credit  
or is, when the Testator's intention was that the per-  
sonal fund should not be diminished. The Exor obtains  
this by going to Chy. This only obtains when the Exor  
has not a sufficiency of assets. 3 Bac 25. Cro. Anst. 17.  
Hra. 605. 1 auth: *infra*.

This rule is distinct from the former one,  
where the personal fund is exhausted by bond creditors,  
& some p. Contract. Creditors are allowed to resort to  
the Heir. a rule which obtains where there is a suf-  
ficiency of personal assets. The Heir, as before men-  
tioned, is liable for specialty debts to the amount of his  
assets, yet the obligee if he chooses may sue the Exor.  
Hra. 441. 3 Co. 12. Esp. 248. 3 Bac 25. Strange 505. Cro. Anst. 17.  
3 Ler. 189.

So the obligee may sue the Heir for a part,  
& the Exor for the remaining part, but if he recovers  
judgment both, & obtain a satisfaction from one,  
the other may be relieved by an *accidit. querela*.  
3 Bac 25. 3 Ler. 303. 305.

Exors & Admins are bound by the contracts of the  
deceased, the not named, as far as they have assets, unless  
where from the nature of the contracts they must be  
performed, if at all, by the testator in person. The Heir  
is not bound even on the special contracts of the deceased  
unless the people named because according to the old Statute  
the Exor has no other property than goods chattels & the annual profits of lands &  
not the land itself, & is liable in an action on a personal contract of the testator  
and 2 Bac 443. 1 Co. 137. Cro. 553. Dyer 14. Hra. 117. 1 Ler 103. 256.

## Executors & Heirs.

And therefore the Heir or rather the Land, is not liable unless expressly named. and you will observe that even when the Heir is bound, or rather where the obligation descends with the Land, his Body cannot be taken in execution: it goes as heir and only. Co Litt. 103. 290. Moore. 2. 203. Plow. 439. 2 Bac 329. 3 Bac 25. 29. 3 Co. D. 12. 1 vent. 180.

The body of a debtor was not originally liable to execution. Plow. 44. Hob. 60.

The Land is appraised to the Creditor. not in fee, but till the issues & profits shall have discharged the debts. The Land is liable in the hands of the Heir, because otherwise the action of debt, allowed at C.D. to the Heir, w<sup>d</sup> be useless. Plow. 439. 441. 2 Bac 329. 3 Ab. 25. 3 Co. 11. 12. Cora J. 450.

This is the only instance in which Lands w<sup>d</sup> be taken in execution, founded in personal actions, at C.D. in behalf of the subject. But Chancery might always take Lands in execution on defect of personal estate. The Lands of the debtor, while in his own hands were first made liable (i.e. one half of them) to execution for debts &c. by Stat. 13 Edw. 1<sup>st</sup>. (Westm. 2<sup>d</sup>.) 3 Bac 329. 2 Rolle 470. 2 B.C. 3 B.C.

This Stat. grants the writ called Cleget. The same year the Stat. de mercatoribus was passed enabling a creditor to pledge all his lands by a recognizance in the nature of a vicum vadium.

The Person of the Debtor was first subjected to execution for debts &c. by Stat 25 Edw. 3. which gave



## Exors & Admors.

capitis et satisfaciendum. 3. Sac 329. 3. 36.

There was a great defect at C.D. in this instance, viz. Dands were liable in the hands of the heir in the specialty debts, & he defeated them, by aliening before action brought. But if he aliened after the writ was obtained, or a Bill filed in B.R. the land was liable in the hands of the purchaser, the judgment having relation to the time of purchasing the original term, or filing of the Bill. Is a judgment? vs the heir loses the land by retrospection, but it is otherwise in case of a judgment vs the executor. But NOW by Stat. 3. 4. Wm & Mary the heir in case of such alienation, before action, is personally liable & also his estate is liable to the value of the land &c. &c. yet the land sold is not liable in the hands of a bona fide purchaser. 3. Sac. 26. 27. 189. Cas. ab. 325. 245. n. 144. 3. 4th 630. 13. Wm 430. 777. Co. Litt. 102. Earth 245. 1. 110. 253.

In case the heir aliened after action brought it is a Qu. whether the rule stands as at C.D. or not.

Exors & Admors are liable only to the amt. of the debts. they are not liable themselves, & when sued on the contracts of the deceased, the action is not vs them but vs the prop<sup>r</sup>. - and it must be in the debt & not in the debt because they are liable only in respect to the prop<sup>r</sup>. they hold for others & not in their own right, & which should not themselves over. If the ex<sup>r</sup> will not pay when he has assets then a scifa. is to be paid to him. 21. Sac 443. 360. 189. 1. 110. 253.

error - then (the heir aliened after action brought) Sac

## Executors & Admin's.

But it has been holden that charging in the "debet & detinet," is now cured by verdict under Stat. 16. & 17. Car. 2<sup>d</sup>.

To the above rule there is an universal exception. An executor may in certain cases be sued as well in the debet as detinet. it is where he is personally liable, & becomes thus liable since the Testator's death, as Suppos. T. T. had a lease for years, he had paid unusually in his life time the rent due; the term is not expired at his death, but comes into the hands of the Exor. he is then bound to pay the rent, & may be sued in the debet only *de bonis propriis*: or to make a plain case of it, say the Testator or intestate had not paid the last years rent. Then you may sue him in the debet, but if it were not payable till after his death, sue in both. 2 Bac 443. 1 Salk 297. 1 Mod 603. Brod. 711. 1 Will 556. Cro J. 411. 546. Cro C. 235. 1 Mod 186.

Another exception where he is sued in the debet, as well as detinet is in case of a devastavit, when he has wasted the affets. i.e. after judgmt. As him as is in *de bonis testatoris*, for he cannot be charged with a devastavit on a mere surmise. If after obtaining judgmt. *de bonis testatoris*, they cannot recover out of the Testator's goods because the Exor. has wasted them, they may then sue the Exor. for a devastavit. 2 Bac 444. 1 Sider. 398. 1 Mod 603. 5 Co. 32. 1 Vent 315.

An Exor. must always be sued in the debet & detinet because he has affets in his own right by debt & scind with T. S. 2<sup>d</sup>. Judge H. thinks that this is more matter of form. 2 Bac 29. 5 Co. 56. Cro E. 712. Plow. 440. or 44. Dyer 344. 1 Ser. 130.



## Exors & Admors.

Charging him in the debt only is cured by ver-  
dict under Stat. 16. & 17. Car 2.<sup>d</sup>

There is a rule that the Exor cannot be bound  
for any thing, for which the testator was not bound. This  
requires some explanation it does not mean that  
the Exor is not bound for a debt incurred after testa-  
tor's death, for he is bound. Suppose the <sup>Testator</sup> ~~Exor~~ covenant  
that his heir shall pay £10. no action will lie vs the heir  
for this sum - the Exor is bound. Or if a man binds his  
self in a bond that at his death he will leave his  
wife £100. which bond he entered into before marriage -  
now this bond from the very condition of it, was not to  
be paid by the Testator but the Exor is bound to pay it.  
So that is meant by the rule is, that the Exor is not bound  
to pay a debt, which the Testator did not owe, & was not  
bound or ought to pay. The Exor cannot be bound to  
pay a debt without consideration which the Testator  
did not owe, tho the Testator might bind himself  
without consideration. 2 Bac 443. Cro. E. 232. Esp. 10. 179.  
Dum 1353.

Hereditary lands in the hands of a Devisee  
were not liable to be taken by bond creditors, & they  
are the creditors. No remedy either at Law or in  
Equity. 3 Bac 27. 1 Ky. C. ab. 144. Esp. 245. 2106.

But now by Stat. 3. & 4. W. & M. devises of land  
are void as to bond creditors, who may have bill either  
with their devisee or with them jointly. 1 Ky. C. ab. 325. 2106.  
Dum. 1353.

And it is a Qu. whether a Devisee can be  
sued.

## Exors & Adminors.

suces, unless the Heir be joined. A devise for the payment of debts or to raise a portion for younger children is not however within the Stat. Such devises are good & a bond creditor cannot defeat them. He is paid only like other creditors *pari passu*. 3 Bac 28, 2 Chy Cas 175. 1005 400. Dyer 344.

The Heir of an Heir is liable for the bond debts of the Ancestor. But the second heir is liable in no case. Mr. Ponds supposes, farther than the first has assets, and not so far, he apprehends, unless the same amount of assets descended to him, *authe supra*.

An Exor or Adminor of an Heir clearly is not liable as such, for the bond debts of the Heir Ancestor: for the Heir himself is ~~not~~ liable only in respect of the Land, his person not being charged. But if the Heir *placit* the Land to defeat the creditors, Equity will follow it in the hands of the Exor or Heir. 3 Bac 28. 2 H. 396. Chy Cas 57. 2 Vern 62. 75. 2 Mod 273. 1 Com 266.

## Who may be an Exor.

Almost every character may be an Exor. The persons who may make Wills, & many other besides. He derives his authority from the Testator who gives confidence in him. In general some persons deprived of the privileges of society for their crimes may be Exors. but they may be removed as we shall see hereafter. For a man may be a capable person at the Testator's death, & may afterwards become a very improper person as for instance if he become an habitual drunkard.





## Exors & Admors.

The acts of an Infant Exor under 17 are not binding. In fact he cannot act at all with respect to an Infant acting at 17, it is not the same as if he were 21. He will remember that all contracts, except some few, by an infant under 21 are voidable, & he may rescind them. But he cannot do this in all cases when acting as Exor. He is not bound by any thing that subjects him to a loss, as if he voluntarily release a bond, without being paid the consideration, he is not bound by it tho an adult Exor w<sup>d</sup> be bound. Suppose an infant Exor under 21, assent to a legacy, and afterwards finds there is not a pile enough to pay debts he is not bound by it tho an adult Exor w<sup>d</sup> be. 1 Chy Cas 257, 2 Bosc 377, 5 Co 29<sup>b</sup>, 1 Fombl 76. 2 Wmsl 213, 4, 7, Godd 103.

An Infant Exor under the age of 17 cannot sell the testator's lease for years even to pay debts. 2 Bosc 377, Cro S. 284, Lane 155.

There are cases that show an Infant under 17 may sell goods to pay debts. But this is not the rule. The rule I have laid down is that an infant Exor, of the age of 17 years is bound by his acts if done according to the office & duty of an Exor, as if he discharge a debt in payment of a whole or subjects him to no loss - and he cannot rescind an act without assigning a sufficient reason for so doing. 1 Bos 244, 1 Bos 140, 5 Co 27, 2 Bosc 377, Cro S. 400, Wmsl 215, 16, 309, 310.

But an infant Exor is not bound by any act to his prejudice. Thus if he should give or sell a release without receiving payment, it w<sup>d</sup> not



## Exors & Am'rs.

not bind him. And so if he sues to a Judge who has not up to the year 1840 for in these cases if he were bound it wd subject him to an action for a devastant, to which no infant can be subject: as he may rescind and not which wd subject him. If he gives a release for more than he receives, it is not binding as to the surplus and if a bond be forfeited & the infant is released it is on receiving the principle only the release is no bar in way to an action on the penalty. 11 Mod 249. 2 Wac 378. Cro E. 677. Lead. 172. 5 Co 27. 11 Mod 733. 11 Mod 146. Hunt 285. 10 Vin 328. Cro E. 141.

An Infant tho of the age of 17 when sued, must appear by Guardian like other infants, & the proceedings will be erroneous for he cannot appoint an Atty. the reason of which is that he has no remedy vs the Atty for mispleading or it is said for neglect. But as Guardian he has a remedy. But if an infant sue as exor he wd be liable to a new judgment it is not erroneous for he sues in under shoit in another's right. & the judgment is for his benefit. But if an infant sue as Atty. it is erroneous the judgment be for him. The distinction must be founded on this that the former is an exor & can act, but the latter is not & can act till the age of 21 years. 2 Wac 378. 3 Wac 100. Cro 420. 441. 11 Mod 49. 11 Mod 130. Cro E. 341. 11 Mod 287. 288. 10 Vin 227. Cro E. 141. 2 Wac 187.

If an infant then sues to recover the money he has paid Atty for services he may appoint an exor as well as for him self. 11 Mod 47. 32. 270. 2. 11 Mod 632. 635. 1144. 11 Mod 734. 11 Mod 112. Cro E. 378. 11 Mod 129. 11 Mod 151.

## Errors & Admonitions.

But if they be sued the infant Es. must appear by Guardian. for an infant Defendant be made liable for costs de bonis propriis by mispleading: for which he w<sup>d</sup> have no remedy w<sup>t</sup> his attorney, tho he has 10 y<sup>r</sup> Guardian. The Infant p<sup>er</sup> se however is not liable for costs. 2 Bul. 151. Sta 318. Holec 287. 3 Mod 236. 3 Bac. 150? 152.

With respect to a fine covert being Es. Cts. of Law & Cts. of Equity acting in opposition to each other have rendered this difficult to be understood. The authorities are contradictory. Cts. of Law say she may act with the consent of her husband. The spiritual Cts. say she may act without his consent. - She is capable of taking the office upon her - she is considered as a feme sole capable of suing & being sued. The true rule is that if the Husband does not contradict she may, according to the Law of the Spiritual Cts. go on to act. But the C. D. says she cannot be tried without the husband's consent. - she cannot do any thing to affect his marital rights, therefore she cannot be committed to jail. - she cannot sue on her own contracts. she must bear the coercion of the husband. But there may be cases where there is no danger of coercion from the husband. where his marital rights are not affected - as where he is banished - here he has nothing to do with her person & she may as well act as any other. But suppose it be Es. & commit a devastavit. why her husband is liable his marital rights are affected & therefore in principle of the C. D. she cannot be Es. without his consent. But the Lawyers how do the spiritual Cts. get



## Emers & Hume's.

get along with their proposition is contradictory  
 the C.D.? Why if no one objects to her being by w. sh.  
 goes on to act. But if there is any fear of her doing  
 wrong the C.D. Cts. control her & will not suffer him to  
 act as he pleases. If the Husband dissents, remember she  
 cannot act. Attempts have been made by the Spi-  
 ritual Cts. when the Husb. dissented to compel her to  
 act after she has accepted a prohibition is then  
 granted. This rule obtains as I have observed only  
 where his marital rights are affected as 2.9. he may  
 refuse to let her make a contract about her sep-  
 arate prop<sup>y</sup>, if thereby his marital rights will be  
 affected but if he has nothing to do with it, & it is  
 were to issue. If this prop<sup>y</sup> it is good - and in y. same  
 case when his marital rights are not affected she  
 might dispose of it by will. Now this rightly under-  
 stood will enable you to reconcile the difference  
 in the Cases. 2 Bac. 378. 5 Co. 110. 1 Com. 235. 1 Wms. 202. 203.  
 241. 244. 2 Bac 117.

You will observe, by the way that y. wife's  
 consent is necessary & after being appointed she  
 cannot be compelled to act or take the Administration  
 upon her, tho' the Husb. sh<sup>d</sup> consent. 2 Bac 378.

But if the Husb. actually administer she is  
 bound by his acts during Coverture she cannot plead  
 no assent. Idem.

If the wife goes on & acts without his consent  
 it is void as to what she has done, & if an action is  
 brought then they cannot plead that she never

## Exors & Admins.

was Exor. but the Husband may prohibit her acting further. She cannot act after being forbidden. *Idem.*

If a feme sole is appointed Exor. & had accepted the trust, & then married, the Hub. cannot control her performing, for he takes her ~~own~~ <sup>own</sup> money, & must perform her duties. But if she has not accepted the trust before marriage, i.e. if she marries before she intermeddles with the estate, she cannot act without his consent, and if she goes on to act in violation both he & she are bound, & sh cannot afterwards refuse it. This rule supposes that the wife has not dissented. if she has, the trust is void. *Idem.*

There is a difference of opinion in the Books whether a feme covert may make a will, or rather a Testament of such Goods as she has as Exr. without her husband's consent. But it is now clearly settled that she may, because it does not affect his marital rights. for 2<sup>d</sup> negative opin.<sup>n</sup> see 2 Bac 49. 1 Mod 608. 1 Mod 211. 12. for 2<sup>d</sup> affirmative, 2 Bac 378. 20. 110. Abington 198. 199.

It is not disputed that she as Exr. may take an Exor of the Testator's goods & this seems much of same as making a testament, for the Exr. as such will have 2<sup>d</sup> disposition of the goods. 2 And. 92. 1 Mod 92. 436. 1 Mod 608. 412. 2 Bac 49.

The King may be an Exr. but he may nominate others to take upon them the execution of probate: & they may be seized as 2<sup>d</sup> Representatives of the Decedent. 1 Com 235. 3 Bac 374. 4 Co. Inst. 645. 235.

A corporation aggregate can never be an Exr.



## Exors & Admors.

Exor because 1<sup>st</sup> It is a body framed for special purposes the Corporation to be sure may sue & be sued but this does not qualify it to be an exor and this would be sufficient without Lord Coke's reason "that an exor is liable to be excommunicated for misdoings" and as a corporation has no soul it cannot be excommunicated. 2<sup>nd</sup> It cannot take an oath to make probate of the will. This latter Mr. Gould thinks is the substantial reason, for a sole Corporation can be an exor because it can take an oath. But Judge W. says he does not know how a sole Corporation can be an exor in his corporate capacity it is evident the person composing the sole Corporation might be an exor in his private capacity like any other individual, but how can he be in his corporate capacity? 1 Leon. 235. 2. Hy. 363. Godd 85. 2 Bac. 370. Abent 17. 20. 1 Rolle 910.

According to the Civil & C. S. Apostates, Traitors, felons, villains, persons attainted &c. cannot be exors. But it seems that all these characters may now be exors for they act in the testator's right. He appoints & puts confidence in them and we have no concern with their honesty. The law is not a very common rule and they cannot sue in a Ct. of Justice in their own right, but being appointed by a notary they may act in another's right. No person then it seems is disabled by the Statute from being an exor for public offences vs the Civil Law. 1. 15. 2 Bac. 375. Co. 2. 11. 128. 1 Rolle 914. 1 Leon 184. Abent 17.

Yet these persons cannot make Wills.

## Exors & Adminors.

& the reason is they have no property for it is all for  
feilds. How? 261. & 330.

It seems then that almost every person may  
be an Exor - who then may not be an Exor? Why in  
Eng<sup>d</sup> persons excommunicated cannot be - the reason  
there is that being excluded from the Church, they  
cannot dispose of the goods of the deceased in pious  
uses. God 85. This is the only instance under the  
Eng<sup>d</sup> Law arising ex delicto.

An Alien may be Exor or Adminor. He may  
have administration i.e. the disposition of lands as  
well as of movables, because he holds in real  
droit. How 235. Bro C. 8. q. 10. 17. 22.

But it is otherwise in the Civil Law, except  
in military testaments, which are governed by the  
jus gentium. God 86. How 417.

It is a Law, whether an Alien Enemy in time  
of war may maintain an action of debt as Exor.  
it is conceded he may hold the goods, & according to  
the strength of authorities he may sue - the reason  
advanced why an Alien Enemy cannot sue is, that  
he withdraws the property into the Enemy's Country  
But this is not the case when he sues as Exor, he  
then acts in real droit. 21 Jac 375. 6. Bro E. 142. 603.  
11 Mod 431. 2. Skin. 370.

Idols & Quakers are incapable of being  
Exors for they cannot execute the last will & admin-  
ist<sup>r</sup>ation whether to execute it. If they are appointed,  
it will remove them. So if an idiot become next



## Executors & Administrators.

non compos, the Ex. may remove him, & grant admin-  
istration to another. 2 Bac 376. God. 85. 6. 1 Salk 36.

The Ex. having the management of this busi-  
ness, can never refuse granting letters testam-  
entary, or probate to an Ex. because he is poor or insol-  
vent, for he derives his authority from the testator.  
The Qu. then arises, what is to be done? he is insol-  
vent - unable to manage his own affairs & how  
can he take care of another's property? There is no  
remedy at L. D. for at L. D. an Ex. is not bound to  
give bonds. The testator required no security & the  
spiritual. Ct. cannot demand it. But a Ct. of Chy  
have taken up this business & compel him to give  
bonds. they consider him as a Trustee, & they have  
a right to compel the faithful performance of  
all trusts. 2 Kay. 361. 1 P. Wm. 25. 2 Bac 376. 7. Carth 457. 8.  
Salk 36. 299. 1 Show 294.

And on the same principle Chy may compel  
an Ex. who tho not insol<sup>vent</sup> is wasting the assets,  
to give security. 2 Vern 249. 2 Bac 377. Chy Cas. 170 & 171.

So on a suggestion of insolvency in the Ex., Chy  
will order the debtors of the deceased not to pay him pen-  
dente litem. 2 Bac 377. Chy Cas. 78.

## Who may be Administrators.

All persons who are not legally disqualified  
may be Exors. They are appointed by ecclesiastical Courts.  
Their duties are generally the same as Exors. They are  
not entitled to a residuum after paying debts, but

## Exors & Admors.

must distribute it according to Law. You have seen that an Exor may do an act. at 17 (that is not pre-judice him) & that he may be appointed at any age. But an Admor cannot act till 21. If he be under under that age & is the person entitled to it as next of kin, Adm<sup>r</sup> must be granted to some one else.

The reason assigned why a person cannot act as Adm<sup>r</sup> till he be of the age of 21. is that he cannot give bonds to the Ordinary, which every Admor is bound to do. But Judge H. thinks this is not the correct reason, for if he could not give sufficient bond himself, he might procure other persons to do it for him, which is certainly as equally as well - the true reason he apprehends is, that till that age he is not supposed to have discretion. In Court not only Admors, but Exors likewise must give bonds. But the C. J. does not oblige Exors to give bonds, tho in some cases, we suppose they may be compelled by a Ct. of Chy. 3 Mod 395. 12 Mod 194. 501. 1 Bulch 39. 2 Bac 381. 5 Bac 121. 5ove 5. Garth 446. 23 May. 338.

It would seem proper to say that an infant cannot be Admor altho he may be the person entitled to it when he arrives at the age of 21. - for no one is Admor till adm<sup>r</sup> is granted by the Ordinary. The case of a person under 17 named as Exor is different, for he is appointed Exor by the Statute. 2 Bac 381. 5 Co 29.

We have seen that a feme. covert may be Ex<sup>r</sup>. So likewise with the consent of her husband she



## Covers & Amors.

may be taken if she be next of kin. The Husband may dissent to it, for his marital rights may be affected by it - 110m. 202. 249. 2 Bac 413.

It is not common to appoint some Courts when there are others in equal degree - for the husband will act for her. & he is not contemplated in the Statute as person who is to be taken. It is not next of kin as the Law requires.

If a feme sole previous to the marriage, undertakes to do after the marriage her husband can not put a period to it; he takes her over, & he will be liable during coverture for acts committed even to a devastator before coverture. 11 Bac 273. Bro. 203. 227. 458. 503. 1 Coll 351. Moor 761.

At Law the Husband is only bound during coverture for the Torts & Contracts of his wife. But in this case Equity goes farther. If the wife &c. has a considerable sum of money as to which she dies this comes into his hands. Although he is not liable to pay her debts, yet as this comes into his hands as Trustee (not as by way of that office) dies with her & by interposes and in equity the Creditors may follow these assets up to the left, into the hands of the husband after her death & after the death of the husband into the hands of his Executors. You c. do follow what the creditor has own right into his hands after her death - but otherwise if we put these assets & by receiving them in his hands as in the hands of a Trustee. have cognizance & then 11 Bac 273. 11m. c. 80. 20m 309. 3. m. 84. 118. The question arises, may not the Creditors & next of kin pursue assets also in Equity?

## Exors & Admors.

I observed that Corporations aggregate c<sup>d</sup> not be Exors; neither can they be Admors. In short, says Judge H. no Corporation as such, can be either Exors or Admors. tho they may like all other persons act as such in their individual capacity. An Excommunicate cannot be an Admor, for the same reason given in case of an Exor. But being excluded from the Church, he cannot dispose of the goods in pious uses. God 85. 2 Bac 375. Co Litt. 134.

But an Outlaw may be an Admor, for he acts in auctoritate, & therefore may sue. 3 Bac 462. 3. or 703. Co Litt. 128.

So a felon c<sup>d</sup> may be Admor as well as Exor - it w<sup>d</sup> seem very improper indeed, in the Ct., to appoint such persons, but they have the power to appoint a felon as executor if he be the next of kin - for he may sue in auctoritate. 1 Vern. 184. 1 Will 914. 2 Bac 375. Vent 17.

An Alien may be Admor as well as Exor. The same Qu. arises here in cases of alien enemies as in executorship. Cro J. 142. 683.

Idols & Lunatics cannot be Admors. God 86.

## The origin of Administrators.

It seems that at C.E. a man might make a Testament & therefore an Exor is an officer known to the C.E. - he was then to pay debts to the extent of assets. But assets were not then the same as they are now, only a rationabilis pars was assets. In what manner the wife & children came to their rationabilis parts is attended with some controversy on the 13<sup>th</sup> 45. 56 is



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is contended by Selden that it was the duty of the Lord of the Manor to see that they were paid their rationabiles partes. 1 Com. 257.

But if a man died intestate, some say that Admors belonged originally to the Ecclesiastica. But Judge C. thinks differently. 1 Lev. 158. 7. 184. 7. See 34. 2 Bac 397.

Other Books say that the King was entitled in the old time to seize upon the goods of an intestate & dispose of them as parens patrie, or General Trustee. It is certain that the widow & Children were entitled to their rationabiles partes, as in case of a Will. But to whom they were originally to look for it seems uncertain. 4 Co. 38. 1 Bac 397. 255.

But in process of time this business was delivered over to the Ecclesiastics. Their jurisdiction both in Testamentary matters, & those of Admors is said to have commenced in the time of Rich. 2<sup>d</sup>. It is said that the rationabiles partes was to be given to widow & Children, which took 2/3 of the property - but what became of the other 1/3? what was done with this residue? 1 Com 257. 2 Bac 397.

Afterwards it seems the Crown invested the Prelates with this branch of the prerogative: so far as he had previously granted it as a franchise to some Lords of Manors. 1 Com 257. 1 Keil 280. 1 Ry. Cong. ab. 255. 4 Co. 37. 255. 476.

The Bishops in exercising this power did not consider that they were obliged to pay debts, but only

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applying the goods of the intestate to such purposes  
is the proper & proper to charitable institutions  
or to such superstitious uses as the mistaken zeal  
of the times had denominated pious. *Quod 277. Finch.  
3. 123. 2 Bl. 494.*

Thus as the ordinary had the disposition  
of intestates affects the probate of wills & courses. *John  
10. 11.* for it was not just & equitable that an "Will  
of the deceased should be proved to the satisfaction  
of the prelate, whose right of distribution, his char-  
tels for the good of his soul was effectually con-  
sidered thereby. The goods of the intestate being  
thus vested in the ordinary upon the most solemn  
& conscientious trust the reverend prelates were not  
accountable to any one but to God & their own  
consciences. Some of the property as mentioned before,  
was applied to pray mens souls out of purgatory  
times to endow their monasteries, & some to private  
use. In doing this they were the more come on all  
the poor & defended the Widow & Orphans. If there  
was no widow nor any children, they kept all  
and in all cases they took to themselves (under the  
name of the Church & Poor) the whole residue of  
the deceased's estate, after the partitionables  
or two thirds of the wife & children were & due to: with-  
out paying even his lawful debts or other char-  
ges thereon. During the early periods of the Feudal  
system in Engl. a man having a wife & children  
could bequeath only one third of his goods & the





## Errors & Amendments.

any longer the adm<sup>r</sup> in their own hands, or the hands of their immediate dependants; & therefore the Stat. 31 Edw. 3. c. 11 provides, that in case of intestacy, the ordinary shall depute the nearest & most lawful friends of the deceased to administer his goods, which Adminors are put upon the same footing, with regard to suits & accounting, as those appointed by will. This is the origin of Adminors as they at present stand; who are only the officers of the Ordinary, appointed by him in pursuance of this Stat. which singles out the next & most lawful friend of the intestate, who is interpreted to be the next of blood that is under no legal disabilities. Thus you at i. 2, no Adminor existed, as appears. 2 Bac 414. Com 258. Dove 2. Ray. 498. 1 H. Bl. 679. 1 Roll. 16. 135. 140. 5 Co 82<sup>a</sup>.

Before this Stat. ordinaries had begun to appoint others to act in their stead, but they did not sue nor were they sued, being more servants or attorneys to the ordinary. 2 Bac 413. Co Litt. 133. 1 Roll 906. Ray. 497. 8. 1 H. Bl. 58.

This Stat. enabled Adminors appointed under it to sue for the recovery of debts due to the deceased, as before might: and subjected them to actions by Creditors as before were before subjected, and as the ordinary was by Stat. West 2. 13 Edw. 1. But it did not oblige them to pay over the surplus after paying debts. it says nothing about it. 2 Bac 414. 213. 496.



## Exors & Admins.

### Who may grant Administ<sup>n</sup>

Wherever the right of proving Wills and granting Administ<sup>n</sup> or administering may have originally resided, this right of granting admin<sup>r</sup> & probate of Wills now in Eng<sup>d</sup> belongs in all cases to the Spiritual Court.

2 Bac 348. Ray<sup>d</sup> 405. 497. 1 Wils. 339. Salk 37. 2132.

And there are Ecs. in the different States of the U.S. under different names who attend to this business, and act in a distinct capacity from Courts of Justice.

It has been said that in Eng<sup>d</sup> the King is the ordinary of the Kingdom, & as such may grant letters of admin<sup>r</sup>. But this right of the King has since been denied.

Let if a person die intestate having no kindred, the practice is for the King to grant letters patent - & the ordinary may admit the patentee to administer. 2 Bac 348. Salk 37. Dove. 5. 85. 2 & 3 P.W. 132.

This admission however is said not to be dignified, but from courtesy or respect.

The ordinary may in such cases dispose of the Goods in pious uses: for he is not obliged to appoint an Admin<sup>r</sup>, as in the case of a husband intestate. It may be that there are no relations to be found, where a man dies intestate, & as the law points out the course to be pursued - this happens more frequently with illegitimates or bastards - who except they have issue can have no relations. There is no provision by C. L. what shall be done with the Estate in such cases. In Eng<sup>d</sup> the King is entitled to it by usage. But there are generally provisions now in many

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States of the U. S. in Statutes. The Judge R. says he has been told that in one or two of the States there is no provision made & then he supposes any person may take the estate as it is, *acens hereditas*. 2 Mac 402. Went 43. S. 1641.

The Court is a Roman, in a neighboring State, in which the intestate dwelt, is allowed to sue here to recover his effects. Kirby 270.

It is otherwise in Eng<sup>d</sup>. But Mr. Pash is not the Court, and agreeable to principle. See 2 H. Bl. 405. 1 H. 154. 677. 684. 690. Amb. 20. 2 W. 3. 35.

## Who are entitled to Administ<sup>n</sup>

The next of kin may be an improper person; if so the C. should appoint some one else. The Stat. 31. Edw. 3<sup>d</sup>. 11. was the first Statute that bound the ordinaries to grant adm<sup>n</sup> to the next & most lawful friends of the intestate. This was a vague term, they generally granted it to the near relations. The Stat. was in Latin & the words then used were "proximo consanguine" which have been construed to mean "next of blood" under no legal disability, but it does not mean "friend". The next of kin were generally appointed but there was a deviation in this, they appointed the Husb. & son to the wife, under the term of "next friend". & to the same was or a wife was appointed Admin<sup>r</sup> to the Husb. when he died intestate. 2 Mac 414. Mott 410. 4. 5. 12. 13. 2. Hen. 201. 96 39. Ray. 498.

If there were several next friends, i.e. friends in equal degree the ordinarie perhaps might select 8 most suitable of them. Ray. 498.



## Of Executors & Administrators.

The power of the Ordinary was enlarged by Stat. 31 Hen 8<sup>th</sup> C.D. which permits him to grant adm<sup>n</sup> either to the Widow or the next of kin, or to both of them at his own discretion & when two or more are in the same degree of kindred, it gives the Ordinary his election to accept which he pleases. 2 King. 498 & 498.

Some Writers have considered 'next friend' & 'next of kin' as synonymous. Judge Reeves thinks it is not the case. Under this Stat. a practice was continued of appointing the Husband adm<sup>n</sup> of the wife when she died possessed of separate property. The Statute gave no such power as it said 'Adm<sup>n</sup> sh<sup>d</sup> be granted to the Widow or next of kin.' The Stat. seems to have been considered as explanatory in some measure of the Statute 3<sup>rd</sup> tho it gave the power of having the next of kin preferred to the wife, or of joining them. It was 5<sup>th</sup> next of kin was explanatory & that the Husband might be considered as next of kin, & therefore he might be appointed adm<sup>n</sup> or to the wife, but this is not the case tho still the practice continued. These two Stat<sup>s</sup> are the foundation of this branch of the law. During this early period it seems by reasoning what they were to do with the estate, were they liable to distribute it? There is some controversy in the books but the Admors did as the Bishops had done before. 1200. & the practice continued till there was a solemn decision by the Ct & they determined that there

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was no remedy & therefore the Admors retained the Estate. Love 2. 18 Wms 381. 1 Vent 219. 2 P Wms 447 or 447  
8 Co 135. 1 Levens 233 Godd. 253.

Soon after this the Civil Commotions commenced, & nothing was done further till a Stat. was made called the Stat. of distributions 22 & 23. Car. 2. which is the basis of all our Law on this subject. It obliged Admors to distribute. & hus<sup>ds</sup> who were admors to their Wives, as well as others. This they conceived was encroaching upon them. as you will suppose hus<sup>ds</sup> composed the greater part of the Legislature, they passed another Stat. in the 29 Car. 2. declaring that hus<sup>ds</sup>, admors of their wives Estates were not within the Stat. of distributions, therefore they were enabled to retain the whole of the Wifes Estate & not give it to the next of kin. Love. 2. 3. 3. Atk 526. 18 Wms 381. 2 DC

I mention this, because it may be very important in settling the Dw. in the U. S. Some of the States say they may retain all the Wifes property. others have done nothing about it. Judge R. thinks that after he has paid debts, he ought on principle to pay the residue over to the next of kin. Notes, Bonds &c. which belong to the wife, he is obliged to pay over to the next of kin after her death unless he releases them to possession during Coverture. At the same time Judge R. it seems clear that he has no right to hold them, yet the Stat. 29. Car. 2. legalized it, & the reason is that he is considered in the nature of



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residuary Legatee. Hence if the hus<sup>d</sup> die before adm<sup>n</sup> taken out, his Representative, i.e. Ex<sup>r</sup> or adm<sup>n</sup> will be entitled to adm<sup>n</sup> on his wife's Estate, to the exclusion of the next of kin in Equity, & the ordinary Surrogate is compellable to grant it. Dove.

The hus<sup>d</sup> is even called next of kin in two cases. see 2 P. Wms 391.

If a wife Ex<sup>r</sup> die, adm<sup>n</sup> of the goods, which she has as Ex<sup>r</sup>, goes not to the hus<sup>d</sup>, but to the next of kin to her testator. Dove 3. 3 Talk 21.

By Stat 31. Edw 3 & 21. Hen 8 the ordinary is compellable to grant adm<sup>n</sup> of the hus<sup>d</sup> effects to his widow or next of kin - but he may grant to either, at his election or to both. When the Testator leaves no wife adm<sup>n</sup> goes to the next of kin, and so vice versa. Among kindred those in the nearest degree are preferred. But when there are several in the same degree, the ordinary may take which he pleases. Dove 4. 1 Com 281. Talk 30. Stra. 552. Ray. 93. 1 Vern 315. 1 P. Wms 351. 10 Mod 908.

Adm<sup>n</sup> when granted to two or more may be joint or several - but it is usually joint. Several adm<sup>n</sup> may be granted of separate parts of the goods. Thus adm<sup>n</sup> of one part may be granted to the wife & another part to the next of kin. But in case of an entire thing as a bond for a certain sum, several adm<sup>n</sup>s cannot be granted. If two or more are appointed adm<sup>n</sup> must be joint. Dove 6. 10 Mod 908. 1 P. Wms 351. Talk 36 1 S. 100.

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In construction of the Stat. there may be persons in the same degree, & yet one class may be preferred to the other. the descending line is preferred to the ascending - i.e. Children are preferred to Parents. for according to the Civil Law, according to which the degrees of kindred are computed, the descent is from the deceased as terminus a quo: & does not ascend among the Ascendants, but in defect of Children. If the Children are not capable, parents are to be appointed. *2 Ave 4. 2 Bac 415. 2 Burr 120. Godd 253. 2 Bl.*

The order is thus. 1<sup>st</sup> Children. 2<sup>d</sup> Parents 3<sup>d</sup> Brothers & Sisters. 4<sup>th</sup> Grand Parents. 5<sup>th</sup> *Pr Chy 527. 2 Wms 41. 3 Atk 762. 1 B. 453.*

There is no preference in Law given to males over females in the same degree. In computing the degrees not quantity of blood but proximity is regarded - therefore the half blood is usually entitled with the whole, in the same degree. There is an instance of brothers of the whole blood & a sister of the half blood, & she was appointed, as the most suitable person. *Supra & Sta 74. 1 Vent. 316. 329. 425.*

There has been some contention (the Judge R. thinks there is no ground for it on 2<sup>d</sup> face of Stat.) whether the claims of the next of kin or next friend or son & daughter, brother & sister, now extend to their representatives. so that representatives as such will include more distant kindred than their parent, & be entitled to the advt. But it does not extend to them. the Stat. does not say to the next of kin & the



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ref<sup>d</sup>. But to the next of kin only. There are contrary dictory authorities on this head. Ray<sup>d</sup>. 498. 2 Bur<sup>d</sup>. on Bur<sup>d</sup>. 414

If there is no person as widow, next of kin &c. that will accept, or if they are improper persons - as Creditor - may be appointed. This is by Custom - there is no Stat. about it. the Ct. may exercise their discretion - he is considered as next Claimant. See 5 24. Halk 37, 38.

If an Ex<sup>r</sup> when appointed should refuse to act, or sh<sup>d</sup>. act & die intestate before he has finished administering, adm<sup>n</sup> must be granted. But here the Stat<sup>s</sup>. 31 Edu<sup>d</sup>. 3. s. 21. Then I do not obtain. They say if a man die intestate - but here he did not die intestate - & therefore it is not in the words of 3. Stat<sup>s</sup>. The ordinary may appoint at his discretion cum testamentis annexo when the Ex<sup>r</sup> refuses to act, & if he had administered in part & died intestate, adm<sup>n</sup> must be granted anew de bonis non cum testamentis annexo. Vent. 219. Sid<sup>d</sup>. 281. 2 Wils. 386.

But here there is a Que. not settled, whether if there be a residuary legatee. he must be appointed Admin<sup>r</sup>, when the Ex<sup>r</sup> refuses to act - or in other words whether the ordinary can appoint any other than the Residuary Legatee, if he be qualified? This is a doubtful point. It is the Custom to appoint him if he be qualified. 1 Wils. 556. 2 Wils. 956.

A case has arisen, whether the Ct. must appoint the next of kin to administer, when I find a will of part of his estate. & died intestate as to the

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not, i.e. left it to be disposed of as the Law directs. It is not  
that the next of kin must be appointed, for it  
comes within the common rule, that as to this part  
he dies intestate. The Exor had nothing to do with what  
had not been entrusted to him, & as to the part not dis-  
posed of by the will, it cannot differ from the common  
cases of intestacy. 3 Bac 396. 1 Dyar 372. 1 Whar 256. 200 220.

You will observe that the custom, in cases  
of general intestacy is to appoint the Widow or next  
of kin, if there be no such person then the Creditor by  
custom, may be appointed - on his refusal the ordi-  
nary Legatee is to be appointed &c. if none of these  
persons accept the ordinary may grant adm<sup>n</sup> to  
whom he pleases, as he might have done before.  
Stat. 31. Edw. 3. 2 Bac 313. 2 Ray 497. Don 5.

The person thus appointed may now it seems,  
be a proper adm<sup>n</sup>, tho before the Stat 31. Edw. 3 he was  
only an Att<sup>y</sup>. or Servant to the Ordinary. Or in this  
case the ordinary may grant letters to such person  
to collect the goods of the deceased. These letters  
do not make him Adm<sup>n</sup> but a kind of Bailiff  
Trustee to gather & keep the goods safely. Don 5.  
2 Inst 393. Went 14.

Where Adm<sup>n</sup> durante minore etate is to be  
granted, as where the next of kin is an infant or  
dun 21, or in case of a will & the Ex<sup>r</sup> named is under  
17, you will observe the Ct are not bound by the  
Stat<sup>s</sup>. to appoint the next of kin, the person upon  
whom is the room of the infant as Curator to take care.



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of the property & has no interest or benefit. but in his right. The Stat goes upon the general ground of his being able to act. & when he is not, the ordinary appoints whom he pleases. 2 Bac 381. Dove 5. Hob 281. 3 Mod 244.

In order to know whether the Exor will accept or not, the Ct. must summon him to appear & if he is a man of common good manners he will give them an answer in person or by Letter. if he refuses, his refusal is to be entered on record. But suppose he takes no notice of the citation how can the Ct. proceed? Why you will observe that it is the Spiritual Ct that has this in charge & if he refuses he is excommunicated & then being considered as dead, they appoint another. In some off. States they appoint another altho he does not appear. In Conn<sup>t</sup> if he does not appear they fine him £5. p. m. not on account of his non acceptance, but because he will not attend agreeably to the citation. 2 Bac 403. 405. 2 Show 252. Went 36. God 60. 140.

## Transmitting the trust of Exors & Admors.

Suppose A. make a will & appoints D. his Exor. who dies before he has finished administering. & appoints C. his Exor. now C. is the Exor of A. But if A. had died intestate & B. was appointed Exor on his intestacy C. cannot administer on the goods of A. the intestate. A. must be granted a new ad litem now. But the Exor of B. may be Exor. of the first testator. if B. had proved the will, for the power of the Exor is founded on

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on the appointment of the deceased & this appointment is founded on a special confidence reposed in the Exor by the deceased & he may transmit it to any one in whom he has equal confidence, i.e. after he has proved the will. But an Admin cannot transmit the trust reposed in him, to another, because he has no interest except what he derives from the ordinary - therefore the trust results to the ordinary. *Lanc 6, 2 Douc 385, 1 Roll 90, 7. 67, 1 Com 251, Went 14, 100, 230, 2 Wink 396.*

So if an Admin dies intestate & Admin is granted on his estate, his Admin is not Admin to the first intestate, because there is no priority between the 2<sup>d</sup> Admin & first intestate - therefore Admin must be granted anew de bonis non of the first intestate. *1 Com 251, 1 Atk 460, 1 Roll 90, 7. 67, 179, 2 DC.*

Suppose A dies leaving two Exors. A & B. & A dies leaving C his Exor. C is not Exor to A. B for B is the surviving sole Exor. A. But as much confidence in B, as he did in A - this is always the case, let there be any number of Exors the Survivors take. But suppose B afterwards dies & appoints D his Exor. who is the Exor to A. Shall C & D both be Exors? No. C alone is Exor to A. - the Exor to the Survivor is always the sole Exor to A. the first Testator. *2 Douc 400, 1 Atk 311, 1 Atk 127, 1 Com 251, 2 DC.*

But the Admin of A's Exor, is not the Representative of A. for they are strangers there is no affinity between them. *1 Com 251, 100, 230, 560, 2 Douc 385.*

The Admin is sometimes bound to administer the goods



## Causa Adam'ors.

goods of A's Exor - a not those of A. the original table  
for 1 Roll 907. b. 1 p. 182.

Therefore Adam'ors de bonis non cum testamen  
to annex must be granted. Statute h. 1. Roll  
907. 2 Bac 386.

But when A appoints B. his Exor and B. dies be  
fore he has proved the will, leaving C. his Exor - C.  
is not the Exor of A. The rule is that Adam'ors must  
be granted cum testamento. Judge Reeves says he  
cannot see the reason of this - for if B. had proved the  
will, C. his Exor would have been the Exor of A. - If B. leaves  
D. his Exor, and B. dies leaving C. his Exor who is an In  
fant - Adam'ors cum testamento minore relate of C. be granted  
to D. then C. cannot be the representative of A. 2 Bac  
386. Cr. 2. 211. Hob 246.

Whenever therefore the course of representa  
tion from Exor to Exor is interrupted by any one Adam  
ors cum testamento are not administered - they must be  
granted for Adam'ors annex. 2 Roll 903. Styles 225. 2 Bac

In all these cases, Adam'ors de bonis is just like  
an Adam'ors granted in case of the first intestacy. It  
may be of certain specific parts of the estate not admin  
istered - the remainder not being committed to a Trust.  
1 Roll 908. 1 Sal 36. 2 Bac

## The manner of proving Wills.

The ordinary way is officio, or at the instance  
of any party interested. Cite the case to prove the will.  
According to some, the will may be cited as instans.

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of any one, that the latter may know whether he has a Legacy left him, & the Ordinar may sequester the testator's goods till the will be proved. 2 Bac 403. Tod. 6. 2 Bac 493.

There are two modes of proving the Will, 1<sup>st</sup> in Common form, as when the Exor presents the will, without citing the parties interested, & takes an oath, deposing that it is the true, the whole, & the last will of the Testator, according to the best of his knowledge & belief, & the Judge upon this proves it. 2<sup>d</sup> In form of Law, as when there is any dispute, saying the will is true, or that it is revoked by a later one, which cannot now be found. then the widow & next of kin are cited to be present if they do not attend the Judge proves it of course, if they do attend, he hears the testimony & determines. The latter is the better way for if the Exor proves the will in Common form, he may be compelled to prove it again in form of Law if there is any dispute. The probate of Wills in Common form may be questioned at any time within 30 days next after, but not when proved in form of Law. 2 Bac 403, 493. Tod. 62.

It may sometimes be uncertain whether the testator be alive or dead. When then the time fixed is expired, if he has not been heard of for that length of time, or if he has been in foreign parts, & the common report is that he is dead, & there is presumptive evidence of it the will is to be proved. There have been instances where the presumption has been almost indubitable, as of a man who was in saw him die



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in the West Indies, & he was mistaken. the man a slave<sup>d</sup> returned. here the probate is void ab initio. the ordinary having no authority or jurisdiction. the Adm<sup>r</sup> being granted only on presumption, it may be ripped up. In analogy to this is the case of a wife who is allowed to marry again, if the hus<sup>d</sup> has been absent 7 years un heard of. it is presumed he is dead. 20 T.R. 229. 2 Bac 403. God 61.2.

In Eng<sup>d</sup> it seems there is no precise time in which the will ought to be proved. As several States in N. A. it is settled. some say 4 m<sup>o</sup>. some say 5. Where it is not settled, it is left at the discretion of the ordinary. 2 B. & 403. God 81.

### Executors refusal.

The office of Ex<sup>r</sup> being a private one, & he being appointed by the Testator, not by Law, he may refuse to accept the Ex<sup>r</sup> ship & not be subject to a penalty. Now for non accepting or non performing many Offices there is a penalty, there being many situations in which a person ought to act, which are not very pleasant or profitable, yet it is necessary that some one undertake them, & therefore they may be compelled. But the Ex<sup>r</sup> ship is private, he may refuse & then adm<sup>r</sup> must be granted cum testamento annexo. 2 Bac 403. on 15. 2 Show 232.

It is laid down in the Civil Law writers, that the ordinary may compel the Ex<sup>r</sup> to prove the will & then make his election either to accept or refuse the Ex<sup>r</sup> ship, but he cannot compel him to accept. God 61.

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The office of Exor is fiduciary, & cannot be assigned. his Exor it is true, may fulfil the trust of for his death. An Exor cannot refuse by any act or pais; as if he says "I will not accept" this is not such an act of refusal as the Ct. will take notice of, or which will alone bind him. It must be by some act whereby the Ct. can certainly determine, as when the Declaration is made in Ct. The refusal must be entered on record in the Proceedings, 66. 930 & 931.

2 Show 252, 66 C. 92, 1 Mod 272, Went. 37.

In a case in Cro E. however when the Exor refused, the record was only "that they deferred to accept" &c. Yet this renunciation was held binding. If then he had one Exor & adminr, & he refused, it put an end to his trust. he never afterwards can prove & will suit. Otherwise, as Exor. & Adminr must be granted cum testamento annexo. Vaughan B. 244. 2 Bac 405. 2 Roll 407.

But you must understand it in this way. if admr is not granted he may waive his refusal. Come forward & prove the will & accept the trust. Plow 281.

Suppose there are two Exors, & one renounce the other may prove the will & get letters testamentary &c. Then the one who renounced may come on at any time & administer afterd. even after & death of his Co. Exor. for the Exorship survives & he is justified to any Exor of his Co. Exor. for as the will is proved the ordinare has no authority to take the refusal.



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during the life of him who proved the will. (as he may afterwards. Since probate by one Ex. is entitled to suit. 1 D. Ch 31. 311. 1 Mos 273. 1 Dyer 160. 7 Mod 34. 1 P Wms 251. 4 Co 37. 2 Dill. 272. 2 Bac 405 3 Co. 28.

But according to the Civil Law the renunciation is peremptory: & conclusive. Salk 311. 3 P Wms 251. 5 Co 28. 9 Co 37.

So the Ex. renouncing in the last case may release assets due to the testator. 2 Dill 29.

Remember that in all actions brought by Ex. and where one has refused the suit must be in the name of both, or as many as there are. Judge Reeves says he knows no reason for this. Usage has attained it in Court. But when suits are brought by Exs they must be as the sole one only, for the Ex. is supposed not to know that any other persons are Exs. 2 Bur 381. 394. 4 Co 37. Salk 207. 4 T R 565.

After an Ex. has once administered he cannot renounce. for by the act of administering he accepts the trusteeship which determines his right of election & makes him liable to suits. 2 Bac 400 2 Mos 146. 1 Vent 303. 2 Dyer 182. Went 38. 2 Jones 72.

It is a general rule that whatever the Ex. does with the effects of the testator before probate, manifesting an intention in him to accept the office amounts to an acceptance, so that he cannot afterwards renounce it. 1 Dyer 166. 2 Bac 406. 1 Roll 717.

There is a case where a man took the goods of a stranger supposing they belonged to the testator, & it was determined to be an acceptance. 2 Bac 406. The

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He must take them on Character of Exor. if he takes them in any other way, it is not an acceptance. As Suppose the testator's cattle are in danger of starving & he takes care of them in winter, & the case is, be the same, where the propy. is disputed & he takes it, claiming it as his own. This is not an acceptance. 1 Mod 19. 2 Bac 404.

Any act which makes one an Exor. or Administrator is an act of Adm. & is deemed an Election of Exor. ship - E.g. taking possession of the testator's goods, and converting them to his own use. And if he receives debts due to the testator, or releases the testator's debt, it is an acceptance. 1 Roll 417. 2 Bac 404. 1 Dyer 160. 11 Vent. 30. Anderson 11.

So also if there be two Exors, & one without consent of the other, takes possession of a specific article bequeathed to him by the testator, this is an administering; for a Legatee cannot take his Legacy without the consent of the Exor. 2 Bac. 406. 1 Roll 917 & 918.

Yet in all these cases, if he has done these things & wishes to excuse himself, he cannot renounce. The Ct. may accept his refusal if they please & grant adm. to another, & then the Exor. can not afterwards resume the office. 1 Roll 917.

Yet if after Adm. granted, only because the Exor. did not appear on summons to prove, & will still if the Exor. chooses to accept, W. T. supposes he may do it, & Adm. must be repeated. And if after the Exor. has refused & Adm. is granted to another,



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it appears to the Judge that the Exor has administered before refusal, (he supposes) the Judge may repeat the Adm<sup>r</sup>. & oblige the Exor to accept. 2 Bac. 403. Went 101.

But if the Exor appeared & has proved the will, he cannot afterwards renounce, for he has accepted by taking the oath that he sh<sup>d</sup>. discharge the trust faithfully. nor can the Ct. accept of his refusal. if the ordinary does refuse him a mandamus lies. 5 Kay<sup>r</sup>. 363. 483. 1 Vent 335. 2 Bac 405.

The manner of granting Administr<sup>n</sup>.  
When it must be granted, as well as the different kinds.

When granted it must be in Writing, & general by order the seal of the Ct. It cannot be granted by parole. Dyer 294. Shaw 408.

1<sup>st</sup> It is to be granted where one dies intestate. Hence the person entitled by the Law to the adm<sup>n</sup>. has a general authority: he has the legal right in to for himself - not for any other, as no one has a superior power over him. Altho Exors are not obliged to give bonds at 6<sup>th</sup> 2<sup>d</sup>. yet all the Stats. in Eng<sup>d</sup>. require that Admors shall give bonds, even Admors cum test<sup>o</sup>. annexo, for the faithful discharge of their duties. It may be granted jointly to 2 or more & if one die the Office survives - it differs from a common delegation authority, for in such case if one die, the authority ceases. Adm<sup>n</sup>. may be granted to several, part to one & part to another. i.e. 2 distinct things. but not of one entire thing as bonds for 1000<sup>l</sup>. 1 Com. 258. 283. 4 Co. 39. Sha 113. Stat 31. Edw. 5. 2 Bac. 416. 394. 2 Vent 514. 1 Atk 482. 1 Salk 36. Went 12. Fox 78.

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If a person be made Exor. without any limitation or restriction, he cannot renounce as to part. He must renounce in toto or not at all. And the same rule holds, Mr J. supposes, in all cases of Adm<sup>r</sup> granted generally. 2 Bac 394. Salk 427. Helo. 103.

2<sup>d</sup> Adm<sup>r</sup> may be granted when the Exor is out of the realm. (this is now settled) - 3<sup>d</sup> Aid for the same reason, when the rightful Adm<sup>r</sup> is out of the realm, another Adm<sup>r</sup> may be appointed. 3 Salk 23. 6 Mod 304. 4 To. 144. Love 192. 5 Kay<sup>d</sup> 1071. 2 Bac 415. 1 Com 263.

So a temporary adm<sup>r</sup> may be granted, while the rightful Adm<sup>r</sup> is outlawed or in prison. see titles in abatement. & outlawry in Bac. & 2 Bac 375. Co Litt 128.

But why sh<sup>d</sup> it be granted in the case of outlawry when an outlaw may be sued as Exor, or Adm<sup>r</sup>? This kind of adm<sup>r</sup> ceases, when the absence or imprisonment &c. of the Exor or rightful Adm<sup>r</sup> is removed.

4<sup>th</sup> So Adm<sup>r</sup> may be granted pendente lite of a will. it may be necessary to settle the estate, before the suit is determined, but remember it ceases when it is decided. 2 Show 69. 2 P. Wms 56. 1 Com 263. Co Litt 253. Sta. 917.

And the case w<sup>l</sup> be the same where the right of Adm<sup>r</sup> is in dispute. Com & Caith. supra.

These temporary adm<sup>r</sup>s are capable of suing & being sued, while their authority continues, even Adm<sup>r</sup>s pendente lite. Com. Show. Sta. supra.

2<sup>d</sup> Kay<sup>d</sup> 1071. 2 Bac 415.



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6th If the Ex'r named refuse, adm<sup>r</sup> must be granted cum testamento annexo. 7th If the Ex'r die before probate. the rule is the same. 8th And if an Ex'r have paid administered & die before probate, Adm<sup>r</sup> is granted cum testamento annexo, because he died before he undertook the execution of the will. 9th And if a will is made naming no Ex'r, Adm<sup>r</sup> is to be granted cum testam<sup>t</sup>. 2 Bac 415. 1 Salk 304. 2 Buc 386. 9 Co 37. 1 Roll 967.

If the Ex'r has proved the will, & gone on to administer, & dies intestate, then Adm<sup>r</sup> de bonis non cum testam<sup>t</sup>. is to be granted. Yet if an Adm<sup>r</sup> dies leaving goods unadministered, adm<sup>r</sup> is granted only de bonis non. Adm<sup>r</sup>.

There is no provision made by C. 2. where the original Adm<sup>r</sup> or Ex'r has bro't an action & obtained judg<sup>t</sup>. & died without taking out execution. then the Adm<sup>r</sup> de bonis non, c. not avail him self of that judg<sup>t</sup>. for it was in favor of a man now dead, & he was not privy to it. But now the Stat<sup>ts</sup> 17. C. 2. & 1 Stat. give the Adm<sup>r</sup> de bonis non a right to sue out a scire facias on the judg<sup>t</sup>. when it is rendered on a verdict. But this was long before the emigration of our ancestors & therefore they were not admitted here. In Court a scire facias may be issued without any Stat. directing it.

2 Bac 415. 386. 1 Salk 304. 5. Selw. 33. 83. Salk 146. 1 S. 29. 6 Mod 290. Salk 322. 3. S. May<sup>r</sup> 1072.

When the Ex'r in this case dies intestate the

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the testator is said to die intestate. 1 Roll. 707.

Adminors de bonis non, have the same right to the personal property of the deceased which remains, as the other Adminors had. i.e. which is not administered in specie. as terms, household furniture &c. So too money received by the original Exor & kept by itself for it can be identified. & also debts due the original testator. But if the original Exor or Adminor had not recovered the money, but had taken a new note for it, in his own name as Exor. it is such a change of the property that it must be considered as money in his hands, & you come on his Representatives for it. & it does not rest in the Adminor de bonis non. Judge St. thinks this could not be supported on principle, it ought to be considered as voting. for it is in the name of the Exor as such, and on principle this is the same as if it were in the name of the testator. If it had been in his own name, not as Exor. it wd. then undoubtedly be a change & it must be paid by his repres<sup>ts</sup> only. But the authorities are so that it must be considered as vested in the hands of his Repres<sup>ts</sup>. 2 Bac 386. 1 Salk 306. 1 Vern 473. 2 Vent. 362. 1 Hall 386.

10<sup>th</sup> If the Exor is under the age of 17. Admin<sup>r</sup> durante minore aetate must be granted to continue till he attain the age of 17. and it is the same, if him, who is entitled to Admin<sup>r</sup> is under 21. Admin<sup>r</sup> durante. &c. must be granted, which ceases when he attains full age. 1 Con 250. 5 Co 29. 1 Dou 192. 3 Mod 24. 3 Sd 102. 2 Bac 280.

An Adminor durante being but a creature



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for the Infant, the ordinary may appoint to that of  
free whom he pleases. 2 Bac 381. 5. Mox 395. 1 Con 250. 8. 262. 150.  
Lalk 29. Dove 192.

It is sometimes laid down that Adm<sup>r</sup>. granted  
during the minority of the infant Ex<sup>r</sup> under the  
age of 17. determines on his marrying a person of full  
age. 2 Bac. 381. Hob. 250. Thin 155. Denied in 1 Con 250.  
5 Co 29<sup>a</sup> 30<sup>a</sup> M<sup>s</sup> 419.

If an Infant or a person of full age be appointed  
Ex<sup>r</sup> or Adm<sup>r</sup>. is not granted durante t<sup>e</sup> to a third  
person, for the one of full age can execute & write.  
Dove. 193.

But it is said that the Ex<sup>r</sup> of full age may  
take administration durante, minority, and  
decide as such or as Ex<sup>r</sup>. 2 Bac. 381. 2 Dove 240. Br. Chy. 46.

If two Infants be Ex<sup>r</sup>s, one of the age of 17. and  
the other under, the former may execute the Will, & Adm<sup>r</sup>.  
durante, t<sup>e</sup> is not to be granted. Dove 193.

In this I conclude the elder Ex<sup>r</sup> cannot take  
administration durante, minority, for no person  
or but an Adult can be Adm<sup>r</sup>.

If A. die leaving A. his Ex<sup>r</sup> and A. die leav-  
ing B. an infant his Ex<sup>r</sup> and C. be appointed Ad-  
ministrator durante minority state of B. C. is not  
the Representative of John Stiles though he acts for  
B. he is the Ex<sup>r</sup> of John Stiles There must be an  
Administrator durante minority state. 2 Bac 381  
6 Co. 211. Dove 233.

## Exors & Admors.

### The authority of an Admior durante minore etate of an Infant Exor or Admior.

It is said in *Cornys*, who however cites no authority that the Admior durante &c. of one entitled to the Admior has for the time all the power of an absolute Admior. Mr. Justice here seems to Question *Cornys* Dec. as not being a good authority of itself; but it is laid down by S. P. Mansfield; & Judge Tenter is of the same opinion, that *Cornys* is a good authority - also by S. P. Kingon. 1 Com 250. 1 Hall 910. 3 Atk. 631.

But it seems to be settled that an Admior durante &c. has not such a general property in the effects of &c. deceased, as an absolute Admior has. 2 Bac. 381. 5 Co 29. Cro E. 719. 1 Com 250. 2 Dev. 103.

This authority is generally given him, *ad commodum et proficiendum Executricis*, so that he is in the nature of a Bailiff to the Infant &c. in execution. This authority relates to the cases of an Admior durante &c. of an Infant entitled to Admior. The authority of an Admior durante &c. is generally granted *pro bono et commodo Executricis*, but not always. Yet tho' this authority be special, he may generally do all acts which are incumbent on an Exor. & which are in legal presumption for the advantage of the Infant & the estate of the deceased. Thus he may assent to a legacy, if there be assets sufficient to pay debts & not otherwise. 3 Bac. 381. 5 Co 29. Swinb. 288.

An Exor may assent under any circumstances, tho' at his peril. 2 Bac 486. 3 Bac 487.

So an Admior durante &c. may sue & be sued.  
2 Bac 381. 382. 1 Com 250. 5 Co 87.



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But he cannot do any thing to the prejudice of the infant, therefore he cannot sell the goods of the decedent any further than they are necessary for the payment of debts; or unless they are bona venditoria, in which case a Bailiff might sell; nor can he otherwise sell a lease for years during the minority of the infant. For the words of his authority are "Administrationem omnium, et singulorum bonorum ad opus, commodum et utilitatem executiois durante, seu minore aetate, et non aliter, nec alio modo committimus," 1<sup>o</sup> 5 Co 29, Brod. 71, 2 Leon. 278, 103, 2 Bac. 381.

He cannot make a lease of a term vested in the Exor or Adm<sup>r</sup>. 2 Bac 381, 1 Com. 281.

There is an Exception to this rule when an Adm<sup>r</sup> suavit<sup>r</sup> 2<sup>o</sup> is granted generally, i. e. not ad commodum &c. There he may lease a term vested in the Exor if it is good till the Exor attains the age of 17 years. But it is now laid down that the Adm<sup>r</sup> even in this case may not sell the goods of the decedent except to pay debts 4<sup>o</sup> 2 Bac 381, 2 Co. 57.

## How & when Adm<sup>r</sup> may be repealed.

There are two modes of repealing Adm<sup>r</sup>. 1<sup>o</sup> When the business is laid before the same Ct. who granted it, for some good reason shewn, it is there repealed. 2<sup>o</sup> When the Ct. who granted the adm<sup>r</sup> refuse to repeal it, & the person who thinks himself aggrieved applies to a superior Ct. Judge V. thinks there is no appeal in it, but permits an appeal from the Ct. of Probate. There are some questions concerning 3<sup>o</sup> power

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of Courts to repeal adm<sup>n</sup>. interesting, & perhaps not fully settled: The old decisions held that the C<sup>t</sup>. not repeal the Adm<sup>n</sup>. they grant, but it seems now settled by modern decisions that adm<sup>n</sup>. may be repealed for various causes. 1<sup>st</sup> when unduly obtained. If Adm<sup>n</sup>. be granted on y<sup>e</sup> ground of supposed intestacy, when a valid will is afterwards found, the adm<sup>n</sup>. must be revoked on probate of y<sup>e</sup> will. 2<sup>d</sup> when in case of actual intestacy adm<sup>n</sup>. is granted to one not legally entitled: as if the person appointed proves not to be the next of kin &c. 3<sup>d</sup> when obtained by a false suggestion. whether made fraudulently or not. In short, when it is obtained through any false apprehension it may be revoked, as where it was granted to an uncle not knowing there was a brother. Dove 18. 47. 1 Com 263. 1 Hult. 38. 1 Vent 128. 1 Str. 911. 2 Mac 410. 3 Salk 22. 1 Sid. 409. 179. 370. 293. 3 Lev. 56. Dyer 339. 6 Co 19<sup>o</sup>. Cro. C. 45. 5. Kay. 90. 1 Roll 707.

Adm<sup>n</sup>. duly obtained may be repealed for matter ex post facto, as if the Adm<sup>n</sup>. become a Simiac, or otherwise incapable of administering. Or suppose the person entitled is not qualified at the intestates death, & adm<sup>n</sup>. for this reason be granted to another this adm<sup>n</sup>. may be repealed when the person entitled becomes capable.

1 Com 263. Dove 18. 19. 1 Sid. 370. 1 Levinz 158. Burns Eccl. Law 236. 1 Hult. 864.

Adm<sup>n</sup>. may be repealed without a sentence of revocation, as by granting a new Administration, which is of itself a revocation of the former. Dove 19. 1 Sid. 471. Cro. C. 460. Burns Supra.

The



Ex'ors & Adm'ors.  
The consequences of repeating Adm'.

I have mentioned (says Judge C.) already that the Ex. who grant adm<sup>n</sup> may revoke it if they please, but if they do not the party aggrieved may appeal. the difference in case of an appeal is great. It is this. Suppose a man has gone in & paid debts & done many other things, & then adm<sup>n</sup> is repeated. now is what he has done void or well done? There are a number of cases agreeing that it is well done, & a number say it is void. 1 Com 264. Dove 50. Cro. T. 46. or 40. 6 C. 18. 1 Bulst 38. 2 Ray 884

I shall state the authorities & my opinion on this subject. There is one general rule that when adm<sup>n</sup> is granted to a wrong person, but regularly granted, & is repeated by the same Ex. then all the intermediate acts are lawful & good: all the authorities agree in this. He is not answerable for what he has done. if debtors have paid him money they cannot afterwards be compelled to pay it over again. The Adm<sup>r</sup> is only liable for what is left in his hands, which he must pay over. It is the same if Adm<sup>n</sup> were granted, & then is afterwards found void. Observe that it is revoked by the same Ex. that granted it: remember this.

In this case if the first Adm<sup>r</sup> was a Creditor to the intestate (Mr. C. says) he might retain like any other rightful Adm<sup>r</sup> to satisfy his debt. Bulst 38. 2 Benc 418. 2 Ray 886. 1 Com 96.

But he is not if an Adm<sup>r</sup> when letters are repeated by citation made up of the Testator's goods by Court before the repeat. the goods is void as to creditors by Stat. 15 Geo. the goods as to the second Adm<sup>r</sup>. 6 C. 18. Dove 50.

## Exors & Admors.

Now suppose the *lc* who grant the *Admors* will not revoke it. They say the one so appointed is a *dictator* & an honest person. Yet they may grant an appeal to the *Superior lc* & they may revoke it, if they please. If they do then the *Admors* is at an end. Now can any one assign a particular reason why all the acts done by the first *Admors* should be void? That all the *Admors* authorities say so. But there are modern authorities, see 3 *Edw.* 128. & the *elementary writers* mean that all the intermediate acts of the *Admors* between the appeal & the repeal only are void. Yet the ancient authorities say all that is done is void. 2 *BC.*

Then you may take this as the rule, that the acts are not done till the appeal: & if the *Admors* should be repeated after the appeal are void, and this seems founded on the best reason. Every thing done under the authority of the *lc* is right as long as they have jurisdiction of it: but in the case put of an appeal from the time of it, the *judg.* is suspended, & all done after this are void. A repeal on a citation is only a repeal of the former letters of *Admors* & does not affect the original sentences. but a counter sentence as one an appeal, acts directly on the sentences appealed from, which is suspended by the appeal. & after a repeal is considered as if it never existed. 1 *Bo.* 13. *Law* 50. *Exors* 460. 3 *Hab.* 206. 2 *Rev.* 40. 3 *Edw.* 128. *How* 244. *Reg.* 224. N.B. the cases in 6 *Edw.* 18. & 1 *Edw.* 225. are where the appeal was after an affirmation on citation. & if the first *Admors* in the last case had



## (10) Errors & Admonitions.

obtained judgment. As the Debtor of the deceased before the  
court, the Debt may be relieved as it by an administrator.  
relax. 1 Com 266. 1 Bac 143. 1 Will 62. 10 B 21. 389.

So if the Debtor be taken in Execution on this  
Judgment, he may be discharged on motion. 3 Bro. Ch. 96.  
3 B 412. 5 C 83.

You will see a case in 3 T. R. 125. a request in  
citation before the same Court that where a will was  
found & proved as testator's will & it was afterwards  
revoked i.e. the Probate, & adm<sup>r</sup> granted all the lawful  
acts done under the will i.e. such as a rightful Exor.  
might do, were considered good. Thus a Debtor who  
paid the supposed Exor was not obliged to pay the  
rightful Exor the same Debt. why? because the  
person acting as Exor had authority from the Ct. and  
whenever a person does any act regularly & right  
under the direction of a Ct. having competent authori-  
ty, it is good. But suppose the Judge of Probate has  
no authority to grant adm<sup>r</sup> as if the property did not  
lie on his district, every thing done under that  
void. Tulk 35.

The difficulties are here. the course of de-  
cisions say, if a person die & leave no Exor, the Ct sup-  
posing there is no will grant adm<sup>r</sup> & the Exor after-  
wards proves the will & adm<sup>r</sup> is revoked, all g. acts  
done by the adm<sup>r</sup> are void & he is a trespasser. There  
are some late decisions to the contrary. The reason  
given for the former decisions is that the Exor had an  
interest in the estate, & who ever did more with it was  
was

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was a trespasser. That even the Ordinary could not de-  
 prive him of this interest. And another reason is that the  
 Ct had no jurisdiction to grant a writ. *Howe* in this  
 way. Ancient auth<sup>s</sup>. 2 Bue 411. 1 Show 411. 1 Com 238. 264. *Howe*?  
 277 2 Devens 183. 1 Vent 303.

But Justice Buller & Justice Goss say<sup>g</sup> above  
 is false doctrine. "If the Ecclesiastical Ct (says Buller),  
 have jurisdiction of the subject matter their sentence  
 as long as it stands unrevoked, shall prevail in all  
 their places. & here the Ct have unquestionable juris-  
 diction, the testator being confessed dead" - he does not  
 say if a man grants to admit when he has no right  
 to do it, that it is good - but he says that the Ct. had  
 jurisdiction to appoint an adm<sup>r</sup>, if there had been no  
 will, & that here what the adm<sup>r</sup> does is valid & good.  
 Judge R. agrees with the late decisions. Another case  
 where the opinions of Buller & Goss are given. The  
 deceased left 2 wills. the Exor. of the first got it proved  
 & then the second appeared, proved the will & consequent  
 to the first was revoked. it was contended that all done  
 under the first was void. that the Ct had no authority  
 to grant letters on the first. They both sets a case in *Devens*  
 as in point. & say the acts done under the first were all  
 right. because the Ct had jurisdiction. 3 T.R. 130. 124. 190.  
 2 Ave 47. 177. Holt 919. 2<sup>d</sup> Ray 1210. 2 Ark 27. 10 Rep<sup>s</sup>. 12 Dev. 158  
 2 Dev. 90. Com 1. 152)

It is settled & said, that the former Adm<sup>r</sup> must in  
 every case account for what he has left in his hands. see  
 2 Lard 132 or 133. (Com. 206. 2 Bue 412.



## CREDITS & DEBITS.

Suppose the Exr. sues the adm'r, in what power is he to bring his action? Why if the adm'r derived his authority from a competent Ct. the Exr. may bring an action of account vs him & compel him to account to what profits remain in his hands. but if he sues him as a tort feygn he will recover only nominal damages. Suppose the debtors of the deceased have paid their debts over to the Adm'r. & he has now become a Bankrupt, so that the Exr. cannot collect them out of him, can the Exr. compel the debtors to pay them over again? The Equity is equal. but Judge Miller says he thinks the debtors are in principle the same persons for it is the policy of the Law that whatever a man is compelled to do under the authority of a Ct. of competent jurisdiction should be considered valid. therefore the judge thinks they sh<sup>d</sup>. not be bound to pay the debts over again. but the authorities are the other way.

2 Bac. 411. 1 Com. 264. Ment. 349. Mor. 279. Coll. 419. Chy. Cas. 126. 2 Ash. 180.

Justice Sullivan contends for this rule in case of a repeal of a Court's order on the probate of a will. - tho not on case of a repeal of any kind upon an appeal. 3 T. C. 138

But it has been held that if a debtor pay money on a judgment & execution, to one who is Exr. de facto, having probate under the seal of a prerogative Court he shall never be forced to pay it again. (See 10 T. C. 138) The settled Law is that it is doubtful if this is an Exr. de facto or Exr. de jure. when there is the necessity of an audit & quodammodo. 1 Bac. 411. 2 H. 4.

The testator appoints I his Exr. in my will,

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& afterwards makes another will & therein appoints B.  
 his Exor. & A has probate of the first. Will grants to him  
 by virtue of which a debtor to the testator pays him  
 a debt, without notice of a second will, & has a re-  
 lease from him - yet upon B's proving, 2d. W. will  
 & repeal of the probate of the first. He may compel  
 the debtor to pay him over once again; for though  
 this be a particular hardship, yet the inconvenience  
 would be much greater, to allow the ordinary to make  
 any other Exor. than whom the testator had nominated.  
 Judge P. says this last is disputable. (vide ante. . . Bac  
 1st. 2 Bac. 411.

What acts an Exor may do before Probate.

On the death of the Testator the Estate is said to vest in the Exor. But it is not considered in Law as vesting in the person who has the right to admit on the death of an intestate. is there may be many persons equally entitled; & till appointment made, it is not known who will be Exor. As the Exor derives all his interest from the will, the property is vested in him before probate. Proving the will is called a "necessary ceremony" - it is properly a "necessary evidence" of the Exor's right. Before the probate an Exor. may pay debts, legacies, & give releases. But he cannot bring an action for an injury done to the Testator's property. for if Def. pleads that he was not Exor., it w<sup>d</sup>. be necessary for him to produce the probate. Altho that the Exor. has not proved the will is true. the will is not in id<sup>e</sup>. till proved, 2 Bac 417. 1 Wms 288. 1 Elk 465, 2 Wms 288, 2 Will 272, 1 Vent 33, Will 272, 288 49, Hob. 31, 2 Wms 3, 6, 4 Will 38.

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## Executors & Administrators.

This evidence of the Executor's right, or the Probator is necessary it is said; because on the probate, there is an inventory exhibited, & other acts to be done, which are for the benefit of Creditors & Legatees. 1 Palk. 303 2 Bac 412. Hent. 30.

But an Administrator can do no valid act, until letters of adm<sup>n</sup> are granted, for he derives the whole of his authority from the ordinary. By valid acts are meant acts affecting the assets or the rights of claimants - & their indifferent acts are such as any person may do. The Ex<sup>r</sup> may e.g. take possession of the Testator's goods &c. in probate - he may enter the house & take possession of securities belonging to the testator. but he can not break an inner door or chest for the purpose. In short he may do almost any act - but he can not, as I mentioned above. 2 Bac 412. 1 Com. 238. Dove 172. Codill 292. Hent. 277. 1 W. Chy 441. 5 Co 28. Godd 144. Went 33. 2 And 277. Hent 31. Sevens 174.

What then is the difference between Executors & Administrators in this respect? If the adm<sup>n</sup> gets out letters & is the person legally entitled; will not his acts done before adm<sup>n</sup> granted him be valid? There are cases which say that if a person entitled to adm<sup>n</sup> should receive debts, & give releases & the p<sup>r</sup> claim adm<sup>n</sup> afterwards, that he might again recover these debts paid, for the right of action was not in him. Judge T. remarks that these cases do not correspond with the most of cases you will find. 1 Mod 119. 126. 3 Co 6. Twiss 281.

There will be this difference - If a bond is given to be paid at a certain day which comes after the testator

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death & before probate, the person must come in and pay the ex<sup>r</sup> by the day appointed, or by C<sup>d</sup>. the penalty is forfeited. So on the other hand, if the bond were made by the testator, the ex<sup>r</sup> must pay by the day, the before probate, or the penalty is forfeited. To be sure by the Stat. 4<sup>th</sup> the penalties may be chartered down in satisfaction on payment in C<sup>d</sup>. of the principal, interest & costs. But it is otherwise with an Adm<sup>r</sup> because he has no authority. This authority is ex<sup>r</sup> & the person indebted C<sup>d</sup>. not know to whom to go. 2 Bac 413. Love 174. 3 Bac 691. 2.

Altho the person named as ex<sup>r</sup> or adm<sup>r</sup> may do almost any act, he is said to be a complete ex<sup>r</sup> as to many purposes, yet he cannot bring actions before probate. This is a general rule. 1 H<sup>o</sup> 213. 2. M<sup>o</sup> 146. Love 177. Salk 301. 5 C<sup>o</sup> 28<sup>a</sup>. 9 C<sup>o</sup> 39<sup>a</sup>. 10 C<sup>o</sup> 52<sup>a</sup>. C<sup>o</sup> Litt 292<sup>a</sup>.

But it does not apply to all cases. he can bring an action of debt, or actions on the testators contract till probate nor for torts committed in the testators lifetime. But he may bring an action & maintain trespass, trover & replevin &c for injuries done to the effects after the testators death. For in this he sues as if y<sup>e</sup> goods were his own. & if no one can maintain a better right, he may recover on the ground of his own possession. He may maintain the action without describing himself as ex<sup>r</sup>. of course a proof of letters testamentary is unnecessary. he need not prove the will. 2 Bac 413. 641. Love 174. 1 Com 238. 1 Salk 301. 7. Carth 154. 1 H<sup>o</sup> 623. 102. 3. 2 Vent 38. 50. 1 plow 33. 83.

So in Eng<sup>d</sup> & in some States now, when there



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distress in realty, the creditor may sue when the reversion of a term for years comes to him from the testator, & the rent accrues after the testator's death - for the rent accrues after the reversion vests in him - But he can not distress for what accrued before the testator's death, without having letters of probate. In all cases where he has done the act himself, he may maintain an action as if before probate he had sold the goods of the testator - he may sue for them before probate for here the contract is his, & not the testator's. 1 Com 238. 2 Dou 174. Salk 302. 1 Vent 300. 1 Roll 417. 2 Bac 413. 3 Dou 415.

Perhaps the proposition is too broad to say that the creditor cannot bring an action on the testator's contract before probate - he certainly may commence an action, but he cannot maintain it before probate. Yet previous to probate the writ may be tested, & if he produces his letters & claimant at the time of declaring when he must make proof, it is sufficient. Those remove the impediment at initia. 5 Co 29. 1 Vent 370. 1 Salk 302 to 307. 1 Com 238. 2 Bac 413. 3 Dou 58. 1 Roll 417. Reg 481.

There is one glaring case among these, & that is this if a creditor pay the one who is entitled to Admors a debt when this same person has obtained Admors he may compel the debtor to pay it to him again. Judge Blackstone thinks that on every principle of policy & justice the Admors ought to be estopped from recovering it again.

## Executors & Administrators. Of Co-Executors.

If there be several Executors they are deemed in law but as one person respecting the testator. Their interest is joint entire indivisible. Therefore it is a general rule that the act of one is the act of all. Hence the possession of one is the possession of all. A sale or gift of the assets by one is valid, it being regarded as the act of all, and so a release of one, or an action of debt, &c. is binding on all. 2 Benc 395. 1 Com 89. 240. Cow E. 347. 1 Roll 426. Dyar 23. Fox. 134. Wren. 95.

So if one grant all his interest in the testator's term for years, the whole passes, for each has an entire & indivisible interest. So if one release his part of a debt due to the testator. 2 Benc 395. Dyar 23. Fox 21. Fox 134. Wren 95.

The case of Co-Executors is different from that of joint tenants. For each of the Executors is possessed of the whole, there being no part or moiety in their possession. So if one grants his interest in the testator's assets, to his Co-Executors nothing passes by the grant, for each was possessed of the whole before. 2 Benc 395. Fox 134.

So one Executor cannot have an action of account as his Co-Executors to the profits of the estate, without 1 Com 89. 240. 1 Roll 117. 118.

But Executors have a right to plead different pleas. Therefore a demand of a debt to contribute to an estate is not good, and the judgment will be set aside as matter. Supra & Hyl. 20. 1 Roll 429. Stat. 4. Edw. 1. Benc. 23.

There is this difference between Executors & joint tenants.



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One of two Admoners cannot bind the other. he cannot make a valid release, nor convey any interest, so as to bind the other. both must join for the authority of Admoners is joint & entire. Judge C. says he can see no reason why there should be a distinction but so is the Law. Mo. Courts says this was formerly doubted. Com 240. 1 Ark 460. Love 21. Cro E. 347. Sid 134.

There is an Exception to this rule, where one Admoner may sue in his own right, as in trespass declaring in his own possession. so he may release the action in such case. 1 Ark 460.

The case of Admoners is in this respect the same as Executors. If one dies the power survives to the remaining one, as in any other case. See Executors see 2 Com 514. 1 Com 240. 1 Rob. 9. For Errors see 1 Com 263. Love 21. 2 Bac 416. Fulk 30.

It is said that an Executor may compel his Co. Executor to account with him in Chy for a moiety of the assets. Linn. 22 Bac 396. Sid 33.

So if the Exor be made residuary Legatee, he may sue the other in the Spiritual Court for a moiety, for he is in the character of a Legatee. 2 Bac 396. Sid 135. West 139.

You will observe the joint interest & joint liability of Exors & Legats only as far as they have assets but it ceases immediately on a suit brought for the assets of one. so for an action amounting to a devastavit for the recovery is to be had & brought jointly & it is not sufficient once who was not concerned in the waste, it is to be brought by a party who is

## Execors & Adm'ors.

Testators, at any time in his hands. Keep in mind this - that their joint liability extends only as far as they have at the time what the property created. not what it was worth. 2 Bac 395. Bro E. 318. 1 Palk 318. 238 134. West. 100.

But if all the Execors join in giving a receipt for money actually received by one only, all are liable at Law to Creditors as if all had received; i.e. each is liable for the whole (says Palk) 2 Bac 396. Palk 318.

This rule however is different in Equity: there the actual receiver only is liable, for recovery is the substance. joining in the receipt is matter of form only. As all the Execors make but one person in Law. they are regularly all to sue & be sued. Palk 317. 9 Co 37. 2 Bac 396. West 95.

If an action be brought by one Execor, a plea that another is Execor, without averring that the latter has administered is bad. for if he has not administered the plaintiff is not bound to know that he is an Execor. and therefore a suit need not be brought as all the Execors who do not act - the acting one only may be sued. But in the above case if the Execor avers that there was another Execor, who had actually acted, the plea will be good, & will abate the first. 2 Bac 396. 1 Bro 161. 1 Sid 242.

But if one Execor sue alone it need not do. it is sufficient for the Def. to plead that there is another Execor, without averring that he has administered, because he is not supposed to know that he has administered & the C. J. requires the suit to be brought in the names of all the Execors. 2 Bac 396. 381. notes.



## Ex'ors & Adm'ors.

If an action be lost, & one of several defendants does not plead the mistake in abatement, he loses the advantage of it. 3 Bac 396. Carth 81.

If in case of two Ex'ors. one refuse to accept, or prosecute, yet he must be named & there must be form and assent. Fulk. 307. 4 Co 37. 558 134.

The effect of summons & severance is to take away his privilege to the fault, to make him no party to it. But if a trespass be committed in the goods of the defendant, while in possession of one of several Ex'ors, he alone may sue for it - for here he need not sue as Ex'or but on his own possession. 2 Bac 397. note. 558 134. Went. 104.

The object of summons & severance is to prevent the Ex'or who does not act from releasing. Co Litt 139. Bro L 652. Hunt. 128. 2 Bac 396. 7. Went 96. 104.

A contrary rule holds, in some of books on the ground that the possession of one is the possession of all. 2 Bac 397. 1st Ed 400. 3 Leon 209.

## Officer de jure tort.

This character is known to the Law. He is a person who without any authority from the Law, or ordinary law, does such acts as belong to the office of a Justice of the Peace, or a Justice of the Peace, or a Justice of the Peace. If he is a trespasser, he must be at least that he can sue for it. 2 Bac 397. 1st Ed 400. 3 Leon 209. 2 Bac 397. 7. Went 96. 104.

Any person who without authority, or without

## Exors & Admors.

assets of the deceased will make a stranger an Exor. de son tort. what acts are these? e.g. he converts the assets to his own use. pays debts out of them; receives fees for debts due to the deceased, & all this unauthorized. In general all acts of acquiring, transferring or disposing the assets will make a person unauthorized. an Exor. de son tort. 2 Bac 387. 3 Co 334. 1 Roll 417. Dyer 105. 157. Wood 49.

The value of what he does is not material, since a man has been made an Exor. de son tort, for milking a Cow. Re. is not the milking of Cows necessary for their preservation? 2 Bac 390. 2 T.R. 100. Dyer 166.

So paying Legacies out of assets, taking a specific Legacy without the Exors consent, or by pleading when sued as Exor. any other plea, than de Unquieted Mind by any other plea he admits himself to be an Exor. 11 Com 265. 2 Bac 387. 1 Roll 418. Dod. 91. 2. Wood 174.

If the widow of the deceased becomes Exor. de son tort by taking more apparel than is suitable to her degree. 1 Ld. Raym. 130. 11 Com. 265. 1 Roll 418. 2 T.R. 100. Dyer 166.

If a stranger takes possession of the Assets, and delivers them over to another, who disposes of them, the latter is Exor. de son tort. 10 2 T.R. 97.

By Stat. 43 Eliz. if goods of the Testator be given by jointure to a W. person, or a release of a debt. & given in fraud, the donee or releasee is Exor. de son tort. 2 Bac 387. 11 Com. 265. Cro. 406. 810.

If the Testator himself has given any goods or land in fraud, that property in the hands of the donee



## Exors & Admors.

done, will make him *exor de bon tort* as to Creditors, from the necessity of the case. for unless he is so considered the Creditors cannot come at the property - but not as to Testators Representatives, nor of him, Legatees &c. it is good as them. 2 Bac 605. 1 Mole 449. Brod. 271. 20. 56. 277. a 77. Mole 197.

There are many acts done by a person under certain circumstances, which w<sup>d</sup>. not make him *exor de bon tort*, yet the same acts done under different circumstances would make him *exor de bon tort*. The whole rule is this - if what he does evinces an intention to be *exor*, he will be considered as *exor de bon tort* - but if it does not evince such an intention he is not to be so considered. Thus feeding & taking care of the decedens cattle; paying & settling decedens debts with his own money; repairing the buildings when suffering for want thereof; providing necessaries for his children &c. will not make him an *exor de bon tort*. So if the property were in dispute, claimed as his own he may take it away without being liable as *exor de bon tort*, unless the claim be a mere colour or artifice. 2 Bac 383. 1 Com 264. 5. G<sup>o</sup> 294. Ross 51. Dyer 166. 2 S. 166. 99.

What acts are sufficient to make an *exor de bon tort*, is always a *Qu. of Law*. The rule is this, If the act of the Stranger be such as fairly warrants the inference that he claims the management & disposal of the effects, he is *exor de bon tort*, and otherwise not. If the act be such as belongs to the office of *exor*, the inference may be drawn. Dyer 166. Mole 167. 168. 2 Bac 383.

## Exors & Admors.

The above rules as to what acts make an Exor. de son tort, apply in their full extent, only to cases where there is no rightful Exor. or Admor acting, & those where there was none at the time of intermeddling. 2 Bac 388. 3 Co 33; 24. Fulk 313. 14. Swinb 289. 383.

For after probate of the will or after the Exor has otherwise administered or after admr. granted, common acts of intermeddling, as taking possession, will not make an Exor de son tort. for there is now a rightful Exor & the goods taken after probate are assets in the rightful Exor. then having come to his hands. Yet the wrong doer is liable as a trespasser to the Exor. Fulk 302. 307. 2 Bac 414. 441.

There are two cases where a man is to be considered as Exor de son tort, tho the acts are committed after probate. 1<sup>st</sup> Where a fraudulent gift is made to a person by the testator. this property in the hands of the donee. makes him an Exor de son tort. as to Creditors, & they may sue him as such. 2<sup>nd</sup> Where tho there be an Exor appointed & sworn after probate, one not only intermeddles, but claims to be the real Exor & he is chargeable as Exor de son tort. And it seems from Fulk 313 that this claim may be inferred so as to subject, from certain acts, such as receiving & paying debts, tho not from common acts of intermeddling. i.e. such as are in the nature of common trespasses. 2 Bac 388. 3 Co 33 & 34. Fulk 313. 319 Fitz. 4. B. 44.

If the intermeddling be before probate, & one sues of necessity before admr. granted, the wrong doer



## Exors & Admors.

intermeddling is *Ex or de son tort* tho' the act is nothing more than taking possession, & he is liable as such to Creditors, unless he deliver the goods to the Exor before action brought. The ground on which he is liable to Creditors is that from his acts they have cause to presume that he is a legal Repres<sup>es</sup>. His own acts make him *Ex or de son tort* & he has no right to disprove the presumption when his own wrongful acts have raised it. 1106. 49. 2 Ct. Cl. 99. Talk 297. 313. 5 Bac 388. 5 Co 34. 1 Roll 418. Cro E. 345. 12 Mod 471.

In short an *Ex or de son tort* is liable to all the trouble of Exor without having any of the profits or advantages of it. Thus he is liable to be sued as Exor but he cannot sue as such. He cannot retain for a debt due to himself, as other Exors can do, even as Creditors of an inferior degree. Stra. 1106. 1 Com. 266. 2 Bac 390. 378. 9. Cro E. 630. 5 Co 30. 2 Mod 51. 12. Mod 441. 471. Vile 137.

But if he pay debts with his own money, he may retain to the amount so paid. 1106. 100. 70.

So if after intermeddling he receives Letters of Adm<sup>n</sup> he may retain for his own debt as Creditors in an equal degree. For the giving of Adm<sup>n</sup> purges away the wrong, except that he is still liable to be sued as *Ex or de son tort*, i.e. by that name. he having however, of Adm<sup>n</sup> granted, all the privileges of a legal Adm<sup>n</sup>. 1106. 266. Stra 406. Comth 104. 2 Com 18. Styles 337. 1 Roll 423.

It will apparently contravene to the last, is that an *Ex or de son tort*, after having taken letters of Adm<sup>n</sup> may be charged as *Ex or de son tort*. so that he shall not be charged

## Exors Admins.

discharge himself by any thing in good faith. But this rule means nothing more than that after estate settled, he may be described in a suit as him as Exor, and he cannot in this account abate the suit, for as to the purposes the wrong is purged. 2 Bac 391. 2 Leon. 95. Cro. E. 102. 365. 815. 818. 2 Bac 391.

Creditors cannot come upon an Exor de son tort, if he has paid out all. Recoverable only as far as he has assets, to the Creditors & Leguees of the deceased, and to the rightful Exor or Admin. Dove 51. Hob 117. Carth. 104. 5 Co. 30. 2 Bac 391. 1 Com 250. Went 257.

But an Exor de son tort is liable in a distinct & peculiar Character to the rightful Exor or Admin. when sued by him he is described as a common trespasser & stranger, - not as Exor. He is liable for the value of things taken; even if he has paid the money out, he is liable as a trespasser, & he must pay some money for it. Creditors you see loose their suits, if he has paid out all that was in his hands. 2 Bac 379. 388. 1 Com 250.

But if the Exor or Admin be a Creditor to the deceased, he may bring debt of the Exor de son tort, with the avowment that none of the estate came to his hands. 2 Bac 379. 1 Hale 940. Treples 389.

In actions by Creditors, an Exor de son tort, is named Exor generally. 5 Co 117. 1 Mod. 208.

It is a general rule that an Exor de son tort is liable only to present debts to creditors, & as to Creditors, he is allowed all payments made to other Creditors in way of an or superior degree. 1 Mod 527. 100. 50. 11. 18. Carth. 104. 21 Co. 307. The



Errors & Admonitions.

He may plead, *plene administravit*, & give such payment in evidence, to support the issue. But as the right of *Exon* or *Admon* he cannot by pleading such payment. lose the action, & therefore such plea is bad. *Mass* 44. 71. *Call* 184. 5 Co 30. 2 *Bac* 390. 1. *Went* 171

Yet he may on the general issue recover, i.e. be allowed in mitigation of damages, the amount of his payment, unless perhaps the right of *Exon* or *Admon* on account of a deficiency of assets, is thereby proven to him requiring or satisfying his own debt. These *Saunder*'s acts however bind the property thus disposed of as the right of *Exon* or *Admon*. *Went* 345. 50. 2 *McC* 507.

The this *Exon* is generally chargeable only to the amount of the assets, yet there is one case, when he is liable for every thing he has done, whether he has paid out a note. i.e. he is liable for the whole amount, whether he has assets or not to that amount, & this seems to me merely for lying. as where an action is brought against him by a Creditor & he pleads "he owes *Exon*" & it is found against him, by this false plea he subjects himself to the payment of the whole debt, tho' the goods which come to his hands be of even so small value. Judge R. thinks the rule is founded on policy - to prohibit such pleas for a lying on record. *1 Com* 266. 2 *Bac* 390. *Bro* 2. 472. *Holt* 49. or 149. *1 Holt* 919. *Gray* 39. *Went* 257.

It is said however that in this case when the value of the assets received is very trifling, the *Exon* or *Admon* tort might be relieved in equity. (*See* *Went* 147.) Judge R. doubts the doctrine as above, and is of opinion that

## Admors.

that it is the intention of the principal of a debt to  
an individual cannot do. In the case put if he had that  
"pure administration" he would have been subject  
not as far as assets received. 1 Com 266, Dyar 166, 2 Buc 390.

It then be a right hand Exor, or an Exor de son tort.  
they may be sued jointly or severally - but it is other-  
wise with a right hand Admors. for an Admors de son tort  
cannot be joined in an action. 1 Com 266, West 255.

An Exor de son tort is only liable dur-  
ing his life, - his Exor or Admors were not liable to Creditors,  
tho they were in equity - but this is remedied  
by Stat. 29 Car 2, & the Exor or Admors of an Exor de son tort  
are, by it, liable to Creditors. This Stat. was made long  
since we emigrated to this Country, 2. Mod 293, Lane 51.  
2 Buc 391. 1 Com 266. 4 Burns Ecc. Law 191.

## Making Debtors Executors

It used to be the Eng<sup>t</sup> Law that if a Debtor were  
made Ex. it was a release of the Debt. It was not the  
case with an Admors. Bro. Inst. 2. 179. Talb. Cap 24. Pownall 439.

The reason assigned in 20. of an Exor was that  
he could not sue himself. This reason is equally  
well to Admors. The reason is not now the rule in Eng<sup>t</sup>.  
It has been held that if a Debtor is made Exor he is  
to pay the debt to Creditors if they want it. - the debt is  
to be considered as appts in his hands - so it may be  
taken to pay 2. goods if there is a deficiency of other as-  
sets. If there be other assets sufficient to pay all debts,  
& he has paid all as well as discharges it so that no  
one has any claim upon him & there is no necessity



Testator & Heirs.

Legatee named, then he can not be compelled to pay it over as he himself in such case considered as residuary Legatee. But if you can infer it was not the testator's intention that the debt sh. be discharged he may be compelled to pay it over. (Gen. is not the remedy in this only 752). Bro. P. Cal. 179. 5 C. 30, 136. 706. 18. 620. 373. 100. 1846. 306 & 31.

There has it is true, been no decision recognizing the principle that he is discharged only where he takes the residuum, but a clear proof that is a true principle is, that the debt of an heir, who is never entitled to the residuum, is never discharged by his appointment.

In Eng. the Exr as such is residuary Legatee unless there be something in the will clearly manifesting the Testator's intention that he should not be. And his right to withhold his own debt as those claiming under the Stat. of distributions, is founded on the idea that he is entitled to the residuum. 1 Rolle 220. 100. 180. Bro. P. 373. 2 B. 208.

It may be a Leg. whether it be have such a Legacy as would bar his right to the residuum, or can retain as such claimants?

## Exors & Admors

### Of making Creditors Exors.

A Debtor may make a Creditor his Exor. & Admors in case the Creditor has an advantage. He may retain as much as will satisfy the debt out of the assets of the testator. But this must be understood to be when his debt is in equal degree with others. for if he be a simple Contract Creditor, he cannot retain as a Creditor by specialty, or any other of superior degree. 2 Bac 378. Plow. 185. 1 Bul 309. 10 Mod 496. But. 128. Went. 31. 108. 115. 2 132.

The same rule applies to Admors; they may retain their debts under the same restrictions. These rules from the nature of the case are reasonable & just: it is analogous to the case of Creditors, where he, who first commences a suit gains a priority to all others in equal degree. and as an Exor cannot sue himself, he must, unless allowed to retain his debt, be postponed to all others of an equal degree. But an Exor de son tort cannot retain for his debt, as I mentioned before because this would be allowing him to take advantage of his own wrong. 108. 115. Went. 31. 5 Co 30. 2 Bac 379. 2 132 507.

An Exor is not obliged to take in part, when there is not assets enough to pay the whole debts. 2 Atk 411.

As to the Exors right to the surplus. In Eng. if an Exor be appointed it has been a Qu. to whom the surplus of personal property after payment of all debts & legacies belongs. 1 Wils 279. 2 Bac 420. Talb. 240. 1 Vent 4.

According to the law here, it belongs to the Exor.



Exors & Adm'ors.

ered as Residuary Legatee. But now if any considerable surplus, not appropriated to any particular purpose, be left to the Exor, or if a Legacy were given him, or if there can be collected from the Will, an intention on the part of the Testator that the Exor sh<sup>d</sup>. not take as residuary Legatee, the Ct. of Chy will order a distribution of it, as in case of Adm<sup>r</sup>. But still however if no such intention can be inferred from the will, the Exor will be considered as Residuary Legatee. The rule at Law is, that if he has paid all claims, he is entitled to the residuum, but this is not to prevail w<sup>th</sup> the intention of testator, and therefore it is, Ct. of Chy will afford relief, on the ground that the Exor is a Trustee. & as such they may control him. 3 P. Wms 43. Pre. Chy 31. 10 Ann 473. 2 Atk 473. 3 H. 225. 30 R. 120. 2201.

An Exor in Chy has no wages. if therefore no Legacy is left him, it is supposed he is entitled to the residuum for his trouble. If he had a trifling Legacy left him, such as a suit of mourning clothes, it w<sup>d</sup>. not cut him out from the residuum. A Legacy bars the Exors right to the residuum, in those cases only, when it affords proof of an intention in the Testator, that the Exor should not take the residuum. & therefore he may have a very large Legacy & yet not be bound to pay over the residuum, if he prove that the Testator said he should have it. Parol proof is admissible to prove notwithstanding the Legacy left him, that it was the Testator's intention that he should be residuary Legatee - but this rule does not hold vice versa.

## Exors & Admors.

versa. In case of Admors there can be no residuum.  
for after paying all debts he must pay over the rest  
according to Law. he is paid for his trouble. & says Judge  
"C. I suppose it is the same case if an Exor. were  
paid for his trouble, he could not take the residuum."  
2 Bro. 468. 4<sup>th</sup> Ed. Paper 235.

Remember that in cases of this nature  
parol proof is admissible to rebut an Equity arising  
an implication, i.e. parol proof may be admitted to  
establish the old legal import of a will or other in-  
strument, when such import varies from the equi-  
table construction. Yet such parol proof cannot  
in this case be admitted to establish the equitable,  
in contradistinction to the old legal construction, but  
the former must be collected from the instrument  
itself - or in other words you never can change  
the legal channel by parol testimony, but on  
the other hand the legal channel may be restored  
from the equity channel, by parol evidence. 1 Atk.  
58. 228. 3 B. Wms. 40. 10 Bro. 31. 1 Wils. 313. 1 Burr. 470. 1 Bro. C. 117.  
C. 201. 228. 2 Atk. C. 240.



## Exors & Admors. J. Mills.

The instrument which the Exor is to execute is called a will, sometimes a testament. It is either Written or nuncupative. A will is the declaration of the intention of a person what shall become with his Estate after his death. It is not a will till the death of the maker, but is revocable by him at any moment before he dies. In the language of Lawyers it is said to be ambulatory till the death of the person making it. Co. Litt. 38. 5 Bac 497.

It is said a will cannot be a perfect one without an Exor is named in it. but it may be by appointing an Exor cum testamento annexo, who then is as fit to execute it, as an Exor. This Instrument without appointing an Exor is technically called a testament. but Judge C. takes no notice of the technical difference between wills & testaments. he calls all "wills." 2 Lev 210. 7 T. R. 146. 2 B. C.

Generally persons under no particular disability may dispose of all his personal Estate by will. This disability almost always arises from want of discretion - this may frequently be presumed as in the case of 10 years old is not supposed capable of making a will. But in all cases the presumption is that the person making a will was of sufficient discretion & ability so that the law presumes all except in those who would combat the will. 2 Lev 140. 2 B. C. 218 to 219. 86. 3. C. 14. 2. 214.

(xv) Admirs.

Persons of the following descriptions cannot make Wills

1<sup>st</sup> Idiots. 2<sup>nd</sup> Senatics, or persons of non sane memory. or persons of such a weak mind that it is supposed they have not understanding enough to make a will. Cases of this kind frequently come before the Court & they are somewhat difficult to decide. In ordinary cases they may appear to have sense, but not enough to make a will. and there are persons who sometimes appear almost like madmen, and yet they may make very good wills. The Ct. must use their discretion & make their decision according to the circumstances of the particular case.

3<sup>rd</sup> If a person is so debilitated with age that at the time of making the will it appeared from his conversation &c. that he was not of sufficient discretion the will cannot be established. 4<sup>th</sup> If the testator be unable thro ignorance or blindness or any cause to read the will, it can't be established unless it be proved that the will was read to him & that he understood it. 5<sup>th</sup> Generally deaf & dumb persons cannot make a will. But the Ct. may admit proof to show that such persons know the contents, & had understanding sufficient to make a disposition. This may sometimes be known by persons acquainted with their dispositions. 6<sup>th</sup> A man in a State of Intoxication cannot make a will. An alien enemy or infidel, or a man of any kind cannot make a testament of lands, altho he has purchased them. For the law does not allow him to hold land, and if he purchases land they



Charles F. Adams.

become perfect. An alien friend may dispose of  
personal property by will, but it is void as alien in  
my country. The reason given is that an alien one  
may will not be permitted to draw property out of the  
country. But Judge St. says, that he finds no authority  
to support him, he cannot see why an alien cannot dis-  
pose of personal property by will, if he leave it to be  
received by the persons in the country. Persons may be  
capable of making wills, & yet their wills may not  
be valid, as if it be made under any restraint or  
fear. the books sometimes use the word duress, but  
the will is not valid if it be under any kind of re-  
straint or fear. &c. &c. &c. But in this case the cause  
of fear, whether real or imaginary ought not to be  
regarded. A person making a will, that is a will of imper-  
tunity, created & uttered in his last moments tell he  
departs from his intention in agreeing to the dicta of  
some other person, is just the case is not to act his  
intention. therefore such will is not good. The estab-  
lishment of the will must depend upon the circum-  
stances introduced in the facts. But in the case, put  
the will might be established tho it were made not  
according to his intention - as if the testator lived one  
or two years afterwards & never altered it. by silence here  
he implicitly says that is now my wish, tho not at  
first. 3<sup>d</sup> There are cases where a person wants his  
relatives to do other acts, but may make a will and  
Infant may dispose of personal property by will tho  
of real property he cannot. The case where a husband

## Exors & Adm'ors.

man make a Testament, is not settled. Some authorities say 14 in males, others say 15. Sir Hardwicke says 17 & Judge W. supposes this to be correct for it is according to the Civil Law which should govern in this respect. There is a very ancient Statute concerning this age here at 14. Every thing that is personal can not be disposed of by will. A husband cannot dispose of his wife's choses in action, unless he reduces them to possession during his life. He cannot dispose of her chattels real, as a term for years - nor of her personalty. <sup>by will, tho by deed he may except the first kind. see tit. "Married Women."</sup> Now can a person by will dispose of property, held in joint tenancy, because this jointure does not intervene between the right of the tenant at death of the devisee or Legatee. 4 Rep. 51.

The Law formerly was that a person could not dispose of a chattel interest for life, with remainder. The reason was that it was considered impossible. An Estate for life is greater than an Estate for years, it is to be sure greater in this point of view that a life Estate is a freehold, but it is impossible for a man to live more than 300 years. Therefore the reason will fail. The Law is now altered. a remainder of a chattel interest may, by way of "executory Devise," be limited over after an Estate for years held, provided the remainder men be all in life, at the time of the death of the devisee & that the contingency on which the remainder is to vest happen within a life or lives in being & 21 years & 273 days after the death. see title "Real Property," head "Executory Devise" 2 Bro. P.C. 173. 2 Bro. C.C. 127. 33. de Litt. 20.



## Exors. Survors.

You see then that you may create a life Estate in a Chattel personal & remainder over. It was formerly considered absurd & it may now very frequently be of no use as if a man were to give a flock of sheep to A with remainder over the remainder man could, nor expect that these would come to him, for they are perishable. They may die, or to prevent their dying the life man might sell them. But if a remainder, after a life Estate, were limited in a piece of plate or a Library of Books, the life man could not sell or dispose of them for they are valuable & inanimate articles, & not perishable. The thing decided must be treated according to the nature of it & on this depends the remainder man's getting it or not. Why formerly compelled the life estate man to give security, but this is now exploded. He is now obliged to lodge an inventory in the Ct of Chy of the property limited over that the remainder man may know what he is to receive. 2 Wils. Chy. Ca. 219. Suppose the man who had a life estate were in failing circumstances, would this compel him to give security that it wd be forthcoming? &c.

An Estates tail cannot be created in personal property tho it may in real property in Eng. and there they do it by procuring a chain of feoffment - but personal property cannot be alienated. it may as well have been before, be given to one for life & remainder over.

## Exors & Admors.

If personal property be given "to a man & the heirs of his body", the absolute ownership vests in the first taker. The reason assigned in this rule by the Eng<sup>l</sup> Lawyers is that an Estate tail in personal property cannot be barred by Fine or Recovery & therefore if suffered to exist, it would create a perpetuity which the Law abhors. But Judge St. says, why may not the same construction according to the intention of the Testator be allowed? if the words had been "to him & his Children" it w<sup>d</sup> be good in favor of Children why not in the former case in favor of "the heirs of his body"? He says that it appears to him that if this were a new Law to be determined, it w<sup>d</sup> be proper to let the remainder go over to the heirs. For the intention of the Testator is always to be complied with, if not contrary to the rules of Law. Now it is not contrary to the rules of Law for one to take an Estate tail after the life of another.

A will of personal property must be in writing, unless under particular circumstances when it may be noncupative, which I shall explain hereafter, signed & published by the Testator. These are the three requisites of a will, as to personal property - it is not necessary there sh<sup>d</sup> be subscribing witnesses as in a Deed of Real Property. I have said it must be signed - now what is signing? We would naturally suppose he were to subscribe his name, as in Deeds &c at the bottom of the instrument - but



## Extra. Admors.

but here it is to be understood that if the Testator has written by himself appear in any part of the will it is a sufficient signing. As if he says "I A.B." &c. it is sufficient. Cases might be conceived where such a note be a sufficient signing. As if he sh<sup>d</sup>. begin to write his will & sh<sup>d</sup>. not like it - but then the paper being intended ~~going~~ to begin another will. here if the Testator sh<sup>d</sup>. never make another will, & this paper be found, still under the circumstances the signing according to the above rule, it could not be established as his will. There is a case in 2000 Laps where the Testator authorized another to sign his name for him, & was held sufficient. So if the Testator makes his mark it is good signing. It has been said that a will written in the Testator's own hand, tho it has neither his name or seal to it, nor witnesses present at its publication, is good, provided it can be proved he did write it. In the will in another man's hand, & never signed by the Testator yet if proved to be according to his instructions & approved by him, it has been held to be a good testament of the personal estate. 21 B.C. 501 Com. 453 &c. See post p. 221. Will. 10. 260.

There is a rule handed down by our Gloucestrian writers, now disputed by eminent Lawyers in Eng<sup>d</sup>. tho there are no authorities to help them out that if a will be made of real & personal property which has not the necessary requisites to make a good will of real property, but is well made as

## 8th & 9th Admoners.

as to personal property, it is void only as to the  
al & good as to the personal property. In support of  
the rule, it is urged, that the intention of the Testator  
ought not to be unnecessarily defeated - & as the  
will is good in part, the intention as to this part  
ought to be carried into effect. But this reasoning  
is not satisfactory - if the will is established in part  
you will find it will, in many conceivable cases,  
lead us away from justice, & the Testator's intention  
for one part of a will is always made with a view  
to the other. E.g. Say in Eng. the Real property descends  
to the eldest son (as it does) - & the father makes his  
will devising his Land to his younger children &  
his personal property to the eldest - & the will needs  
the necessary requisites by which to convey Real  
Property. now if the will is established according to the  
rule the eldest takes the property, & the <sup>younger</sup> children take  
nothing - the intention of the Testator is defeated. In  
Eng. before taking all the personal property, there  
would also descend to him in this country he would  
take his distributive share of the Real Estate. This  
contradicts the well known rule, that the intention  
of the Testator is always to govern, if you follow the  
intention, you have the construction."

At C.S. nuncupative wills might be made  
of personal property. But the restrictions imposed  
on those wills by the Stat. 27<sup>th</sup> & 2<sup>d</sup> have almost  
obliterated them.

Done



## Exors & Adm'ors.

### The duty of Executors & Adm'ors.

We find that Exors & Adm'ors are the Representatives of the decedent, that they are Trustees, the Exec for the Creditors & Delegates, & the Adm' for Creditors & the persons interested in the Land. Thus their great duties are to pay debts & Delegates, & those when the Land has appointed to receive their distributive shares. But the Exor or Adm'or's first duty is to make out an inventory of all the Estate, which can be assets in his hands, to have it appraised by judicious persons under oath, & lodge it in the Ct. of Probate, and for this intended property, he must account with the same Court. He is not bound to pay the amount of his appraisal, but he accounts for what is raised by the property. If it be sold for less than the appraised value, he is not liable for the loss, unless it were incurred by his own fraud or negligence, in which case he is liable for the amount, to an action on his bond, by Creditors. But if Creditors sue in common form for their debts, they must ground the action merely on the inventory. If the Estate sh<sup>d</sup>. sell for more than the appraisal, he gains nothing, but must account with the Ct. of Probate for the value. You say then the appraisal is no use of what use is it? Why it shows what the value was at the time of the persons whose interests are thereby to be known why the property sold for less. It is prima facie evidence of the value and Creditors or Delegates may take at the price as may they see. But there may be several instances when they will

## Clerks & Admors.

The Exor ought not to take it himself nor suffer others to take it, at the appraised value - as when the Testator left 300 bags of Cotton which was appraised at 17 Cents per lb & it immediately rose in value to 25 Cents here it wd. be depriving the estate, if one were permitted to take the Cottons at its appraisal. The Judge takes the true rule to be, that the Exor nor any other can take, when it will be to the detriment of the estate. A Judge of Probate ought not to reject an inventory of property, the title to which is disputed, for the decision cannot affect the right of trying the title.

On principles of C. D. no suit can be maintained vs an Exor beyond assets in his hands - he may plead plene administravit - or in other words he is never liable to Execution till assets are received by him, unless he have made unreasonable delay - But suppose debts are due & near hand - then Judge may be rendered, & the Exor will be stayed till they become due. See 22. 467. or 47. Shepard 472.

So fast as assets come to his hands his liability increases - to day he may owe nothing tomorrow he liable for much - If the Exor put suit to an arbitrator & the Arbitrators award to him a certain sum which he is to pay he cannot afterwards avoid the want of assets to that amount. An "Assignment Comprobatum" by an Exor of as much of money due from the Testator, does not make the Exor personally liable. 7 T. R. 453. 5 H. 61. 6. 1. 1 H. Bl. 1028. or 1028. 2 H. 618.

The Power & Duty of an Exor after an assignment



## Exors & Admins.

near to the same - there are however some points in which they differ they are both bound for their debtors & intestates debts to the extent of assets only. Cro. 2. 318. 2 Wac 345. value 100.

These necessary duties being performed by the exor & adm, having given in an inventory, & entered into a bond that he will transact the bus. faithfully & justly what is he then to do what comes next? Why

### The Payment of Debts.

In the payment of Debts, there is (at C. 2.) a certain order to be observed. It is as follows. 1<sup>st</sup> Funeral Charges & the expenses of proving the will, or getting a sum. This takes all the property & a debt is lost, as he he may plead plene administravit. 2<sup>nd</sup> Debts due to the King or to the State by Statute or Specialty. 3<sup>rd</sup> Debts due by Particular Statutes, as forfeitures, or last sickness Debts. this last seems founded on human pity. The person e.g. is poor - the Physician & nurse are called in they will not refuse their attendance, & as they are sure of their debts being paid previously to many others. Nurses are generally poor. they risk their lives almost. & when they are sure of being paid for their labouring in their last sickness we will attend. Several Statutes in different States of the U. S. leave out the word last & say sickness alone. This brings up the Q. whether it does not extend to other debts as the words of the Statute are 'sickness debts'. Judge Story in Chiles the word last was left out - per

## Creditors & Debtors.

purpose, that these debts, might be preferred. It is a copy of the Engl. Stat. 4<sup>th</sup> the next class are General Debts, or Debts of record. 5<sup>th</sup> the next are Special Debts, i.e. Debts due on special contracts under Seal. 6<sup>th</sup> Simple Contract Debts without seal. If there is not sufficient to pay simple contract creditors out of the assets, they have no remedy. 3 P. W. 402. In the case of 2 Barn 321. 2 Bacc 422. Doe.

This part of the Engl. Law does not present a very agreeable picture to the mind, nor does it evince much equality. Simple contract creditors whose claims are frequently the most meritorious, are postponed to all others, & may be defrauded of their whole debts. Suppose the debtor has gone on & paid all debts previous to bond creditors, he has enough left to pay some of these but not all, then he pays which he pleases. For the rule is, of creditors in general degree he may pay which he pleases, & vice versa some one of them has not gone on to sue, by this means obtained a priority, & provided also that he cannot prefer a debt in present solvency in futuro, to those which are already payable, unless the latter are of an inferior degree. 2 Bacc 434. 2 Bacc 37. 6 Bro P. C. 315.

But a creditor may gain a priority, by commencing a suit, or by what is called legal diligence to those in same degree. If the debtor has paid a creditor of a lower degree, when there are others of a higher unpaid, & he has not assets left, he is personally liable.



## EXRS. ADMORS.

de bonis propriis. But if he is not known of it, he may be released if he have used means to collect the credit or, as by advertising &c. It is said the Exor is bound to know of record debts, & that if he pays debts of a Cow or sheep &c. has not affds to pay those he is liable de bonis propriis. The reason assigned is that he has the means of ascertaining the existences of those debts, by a reference to the record. But this is not correct, says Judge W. the records may be all over the State, one is not bound to search every record. 15 B. 507. 2 Buss. 435. Plow. 279. 18 B. 230. 2 Shaw. 492. 2 H. Bl. 413.

A voluntary debt due from the Testator to a person the under seal, is to be paid prior to all debts but preferred to legacies. The obligee of such a bond, must be paid all his debt, tho there is nothing left to pay the Legatees. 1 Atk. 292. Dove 56.

But how is the Exor to ascertain whether a voluntary bond or not? If the fact is contested between the obligee & Creditors the Exor may file an affidavit calling the parties to attend & when brought there, he leaves them to litigate the Law at their own expense. & afterwards make payment according to the decision thus made. But now ask is not this contrary to the rules of Law? No, an enquiry may always be made into the consideration of bonds when third persons are interested, but as between the parties this cannot be done unless it is fraudulent & illegal.

It is the duty of the Exor to retain Assets in his hands for the payment of debts in present solution

## Exors & Admors.

in futuro. If the Exor. or Adm. having thus retained a s. to become a Bankrupt before payment, it is somewhat doubtful whether the creditors can pursue the a. s. into the hands of the Assignees & Devisees. see little of "Reversion of Chancery")

No time is limited by the Eng<sup>t</sup> Law for the exhaustion of claims to the Estate of the deceased. If the Exor has paid out the whole of the Estate, observing the priority of claims above mentioned, he pleads *plene administravit*.

Under the Law of Eng<sup>t</sup> & all the States in U. S. the personal property is to go to the Exor or Adm. as Trustees but the Real goes to the heir. But in this country when the personal fund is exhausted, the real is to be taken. This is more consistent with justice than the Eng<sup>t</sup> Law. Again in some of the States, if there be any suspicion that the Estate will not pay all the Cl. averages the Debts, & all are paid *pari passu*, no preference being given to any but last sickness debts, public Statute Debts, & Debts arising from funeral expenses.



## Executors & Administrators.

### Of Legacies.

After the payment of debts the next duty of an Executor, is to pay the Legacies. A Legacy is defined to be a bequest of particular goods & chattels by testament. 2 B. 412, 2 B. 466. 100. 271.

The Person, to whom the Legacy is given, is called the Legatee. If it were a gift of real property, the donee is styled Devisee. An Executor to whom a Legacy is given cannot prefer himself as in case of debts. *Idem* *supra*. 100. 434.

At the death of the Testator, the inheritance right of the Legatee commences, tho' the legal property of the Legacy, still resides in the Executor. Co. Litt. 11. 2. 100. 598. 100. 190.

And he may dispose even of a specific legacy to pay debts. He may dispose of a Legacy, not for the payment of debts, but then such disposition does not bar the Legatee's right to the Executor. The Executor cannot be obliged to pay the Legacy itself, but the value of it. A Legatee cannot take a Legacy, without the consent of the Executor. His assent vests the legal property in the Legatee. & small note may amount to an assent. *Idem* *supra*.

Such is the nature of the property in the Executor's hands that without his assent the Legatee cannot take it: if the Executor will not give it up, he may be compelled to pay for it. Chancery has intervened in certain cases to compel him to give up particular specific legacies as a family picture &c. whose greatest value

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consists in its being an object of tender affection, and remembrance. If however it be wanted to pay debts this will not interfere.

### Of Pecuniary & Specific Legacies.

Specific Legacies are bequests of things specified, which can be identified. Pecuniary Legacies are bequests of sums of money in general terms, not identified in any particular parcel. It is not necessary that specific legacies should not be money, for if the testator bequeaths a bag of money in a certain drawer, it is a specific legacy. 2 Salk 416. Moore 413. Mann 51. 2 Vern. 288. 1 W. 422. 3 Atk yb. Repor 25.

There is this rule to be observed with respect to pecuniary & specific legacies. There may be a deficiency of assets to pay debts - the pecuniary legacies are first liable - they must be exhausted before the specific legacies can be touched - tho the specific legacies are to be taken, if there be still a deficiency of assets. Bro Chy Cas. 50. or 50. Repor 25.

When the specific legacies are thus necessarily taken, the Exor is not liable - if they are not necessary & are taken, the Exor is liable. If the specific legacies are lost, those to whom they were given must bear the loss - they cannot recover from the Exor. The Exor cannot be said to do wrong in taking specific legacies, but he is liable for the value of them. Bro Chy Cas. 180. Repor 24.

Yon

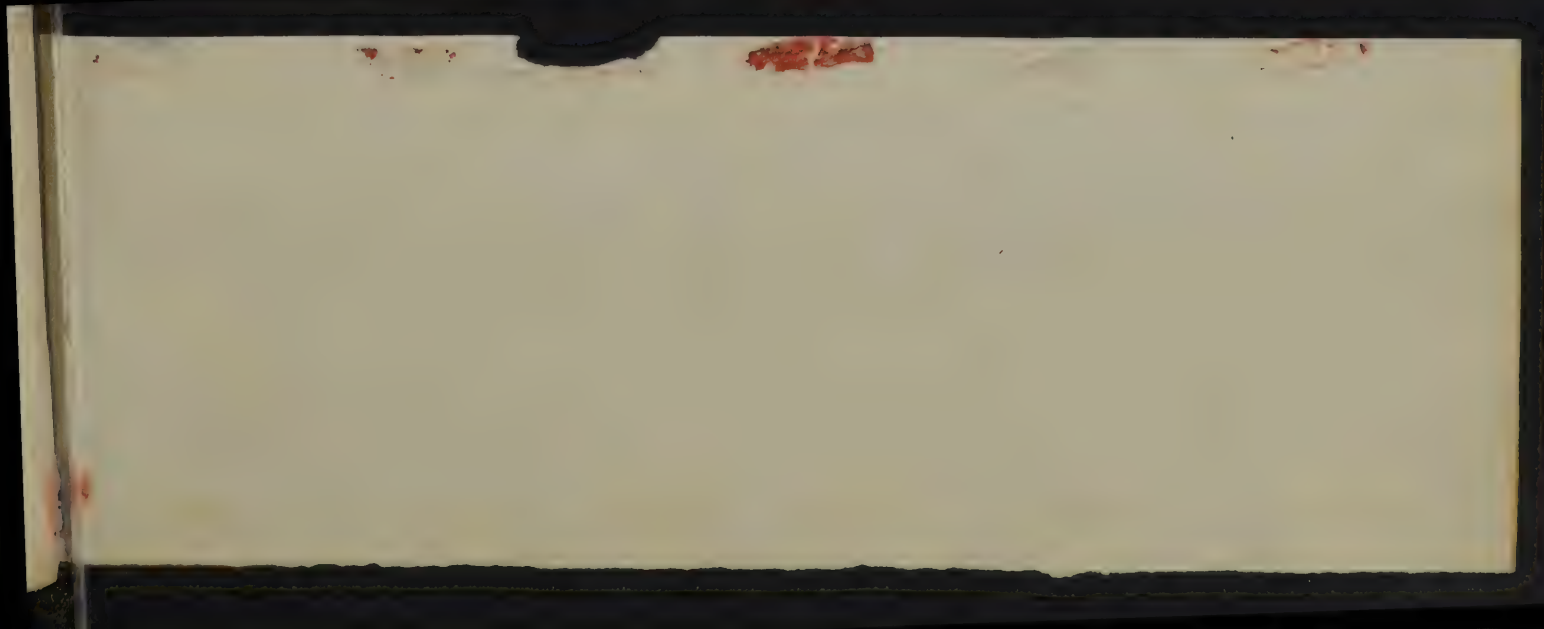


You see the Specific Legacies must be paid first, now suppose these are all paid, & there is not assets sufficient to pay all the pecuniary Legacies. What then is to be done? Why the Exor must average their claims, & pay them out *pari passu*. 1 P. Wms 422. 490 & 95. Reher III.

If there be not enough to pay Specific Legacies those who are first paid are always preferred and there shall be no average among them.

There is a Qu. unsettled with respect to Specific Legacies. & R. & P. There was not assets enough to pay debts without taking some one of them - one is taken what is to be done must there be an average as in case of pecuniary Legacies? must the other Legatus make him an allowance? This is not fully settled - the Authorities are contradictory. Com. Di. li. "Legacy in Chancery."

It seems just & reasonable that there should be an average in this case, as there is in case of pecuniary Legacies - it is more difficult to be sure to make the average but Judge Reeve thinks that under direction of a Ct. of Ch. the Legatus whose funds are not taken, would be compelled to make a reasonable allowance to those whose Legacies have been taken. But others say that if the Legacy were lost with the intervention of the Exor the Legatee would have to bear the loss being in a worse situation than if it had been lost. Yet still the other appears more equitable & so doubtless the Court will decide it. Copied 11/2.





There are certain cases where pecuniary legacies are preferred to specific ones. But this preference depends absolutely on the intention of the testator. If a testator divides all his personal estate at a particular place, and is a specific legatee, & there is no personal estate in which he has a pecuniary legacy, it is to be paid out of the personal estate. The specific legacies are chargeable with the pecuniary legacy, there being no other personal fund from which it can be raised. See *Will 293* & *Rees 113*. (It is to be observed that the closing principle under the head of "pecuniary legacies" omitted three mistakes. *See* *Will 293*.)

(ix) Adm'rs.

(f) Vested and Lapsed Legacies.

There is a difference between a vested & a Lapsed Legacy. If a Legacy is vested, it goes on the death of the Testator to his Representative. If it is Lapsed it cannot be taken by the Legatee, but goes back into the residuum. There are two kinds of Lapsed Legacies...

First. If a Legatee dies before the Testator, there is not a remainder limited over, it is a Lapsed Legacy. This applies as well to (Real as Personal Estate). 1. R. 2. 200. 2. R. 2. 200. 3. R. 2. 200.

The Legatee who has the residuum, if there be one, is entitled to Lapsed Legacies - but if there be no residuum Legatee, the Lapsed Legacy will go according to the Stat. of distributions. 2 Burn 207. 2 Burn 200. 2 Burn 378. 521. 216. R. 2. 200. 470. 547.

There are one or two Exceptions, in a distinction in the Statute as to this rule. If the Legacy Lapsed by the death of the Legatee during the life of the Testator it goes to the next of kin & not to the Residuary Legatee. But if it lapses after the death of the Testator, or for failure of the conditions on which it was given, it goes to the Residuary Legatee. 2 Burn. 374.

A Second kind of Lapsed Legacy is, When the Legatee may outlive the Testator, but it was never intended any Legacy should be given unless something happened - if it does not happen, the legacy is lapsed. it then goes depends on a contingency. The most common cases are where there is a distribution more or less than twice. They tell you if a Legacy be given that



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payable at a future day, it is vested. But if given to him at a certain age, it does not vest until he attains that age, & if he dies before the time specified it becomes a Lapsed Legacy. To explain what it would be if a Legacy be given to one, to be paid when he attains the age of 21 years it is a vested Legacy, an interest which commences in present, although it be solvendum in future; & if the Legatee dies before that age his Representative shall receive it out of the Testator's personal estate. But if a contingent Legacy be left to any one, as e.g. when he attains, or if he attains the age of 21 & he dies before that time it is a Lapsed Legacy. Now as remarked before, this distinction seems overnice. The Testator in order to ensure effect to his intentions must not only be a Sinner but must get the rules by heart - very few making a will, would know of this distinction, & therefore the testator's intention may very frequently be thwarted. But so is the rule.  
16 C. 5. 42. 217. 1 Bur. 227. 2 S. R. 610. 3 Bro. Chy. Cas. 471. 2 Vern 675.  
Bro. Chy. 21. H. W. 820. 2 Vent. 342. 1 New 462. 1 E. Cas. at 295.  
2 B. C. 512. Clapen 172.

The rules of distinction are not however without exceptions. If such Legacies are charged on Real Estate, & the heir is to pay them if the Legatee dies before the time at which they are payable, in one case it given in the other, they shall be paid, no matter in what person they are given. This exception is taken in favor of the heir who is always a favorite in the Engl. Law. 2 S. R. 610. n. 601. B. C. 513. There

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There are also exceptions on the other hand; If a Legacy be given to be paid at a future time, & it is perhaps on interest, tho' the Legatee die before the time, it is not satisfied. Chy says it was the intention of the testator, that the Legatee or his Repres<sup>t</sup> should have it. The rule is the same where the Legacy is to be paid out of certain stock in funds or which yields an annual increase; it is not satisfied. 2 Bro Chy Cas. 3. 305. 375. Prob Chy 117. 1 Atk. 412. 512. 3 Atk. 645. 2 Ves. 263. 2 Vern 673. 1 W. 462. Repor 180.

Chy will compel the heirs to pay a Legacy charged on his land, yet if such Legacy lapse, or if it be vested & the Legatee die before the day of payment, the heirs will not hold it to the exclusion of those who claim under the Stat. of distributions. The same favor is shown to Devises, & whose Devises Legacies are charged. 2 P Wms 276. 1 Atk. 522. 552. or 52.

The person who is entitled to a lapsed Legacy may demand payment, immediately after the death of the first Legatee, provided a year & a day be passed, & no time be fixed by the testator. So says Mr. Justice. Judge says words are these, "It is said that where a Legacy is lapsed, the residuary Legatee entitled to it, cannot take it, till the time it would have vested if the contingency had happened. but I think the rule is not correct, where there is no time fixed by the testator. if the time were fixed when it was to be paid it w<sup>d</sup> be otherwise." 2 Wms 31. 203. 353.

The person entitled to a vested Legacy, where the Legatee died w<sup>d</sup> not be entitled to it, till the time the legatee's Legatee w<sup>d</sup> have been entitled had he been



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living. Remember that if a Legacy is given generally the portion in time of payment not being fixed, it is not due till the end of a year from the testator's death. 2 Vern 31. 2 Wils. 385. 1 W. 285.

A Legacy may be made with a proviso, that if the Legatee die before the testator, or before the Legacy attains a certain age, it shall go to another - Such limitation shall be good. Re. Chy. 470. 2 Vern 287. 5 W. 511.

## Conditional Legacies.

There are many Legacies given on Conditions. these Conditions are frequently considered as void, and the Legacies good. it matters not what the condition is, if it be illegal or impossible it is void; & the Legacy will take place. The most general condition is, to restrain marriage. tho' there may be others, as where a Legacy is given to one on condition that he will not disturb the Will. here if the Legatee commences a suit disputing the will, if there were *probabilis causa litigandi*, the Legacy is not forfeited. so if there be any illegal Condition. But Law. the Legacy is good & the Condition void. 2 Vern 91. Repor 42.

Legacies are frequently given on condition that the Legatee shall not take, provided he or she marries without the consent of some certain person pointed out in the Will. Such restraints are generally void, & the Legatee takes the legacy independent thereof. notwithstanding the intention of the testator. for it is a general rule in lly that all conditions restraining

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ing marriages are to be construed very strictly - being  
prejudicial to society, as they hinder the propagation  
of the species. It is universally true that when Lega-  
cies have an absolute condition annexed to them, in  
restraint of marriages, these conditions are void & the  
Legacies vest absolutely - as when a Legacy is left to a  
Daughter provided she never marries. But suppose  
a Legacy is given to a female in case she does not  
marry a particular person, or one of a particular  
profession or calling - in general these conditions are  
void - the restraint is illegal - it bears the appearance  
of mere whim, which should never be indulged or grat-  
ified. Yet possibly the Parent might know of a very  
improvident match, which his daughter went in dan-  
ger of making - & then it would be perfectly proper  
in him to prohibit it. there would be a sufficient  
cause for imposing such a condition. 3 Bac. 479. Mox  
86. 1 Vern 28. 1 Fonb. 249. 252. Hwa. 214.

But we may from these cases collect, that  
when a person has a particular interest, in imposing  
such a restraint, as if the father of a family of Children  
leave his wife a Legacy on condition that she shall  
not again marry it is exempt from the above rules -  
for the husband is supposed to have in view, & be in-  
terested in, the nurture & education of his Children -  
on this account the condition is allowed to be binding.  
1 Vern. 30. 2. Hwa 86 & 85 215.

Yet if there had been no children, or if a Lega-  
cy is given by a Stranger to a woman on such condition  
it



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the condition would be nugatory, & the Legacy would vest - for here the Chancellor observes, there is no good reason, why a Widow, should not be allowed to marry as well as a maid. *God. 46.*

There may be conditions restrictive of marriage before a certain age, which are binding - but such restriction must be reasonable. There was a case where a father left his Daughter a Legacy, provided she did not marry till she arrived at the age of 25 years. This restraint was considered unreasonable, & was adjudged void - & she took the Legacy. There is another case where the Legacy was given provided she did not marry till she was 16. now this seemed a reasonable restraint, & the condition was adjudged good. There has also been an instance where a Legacy was given to a female, provided she would not marry at ~~at~~ a certain place named in the Will. - Now tho' this does not seem within the principles, yet it was adjudged to be a reasonable restraint, as it was so very easy to go somewhere else to be married. So also restraints have been considered binding, where the Legacy was not to take provided she married a person of a particular creed as a papist - but this is of no concern to us in this Country. *1 P. Wms 285. 1 H. 6. 249. 1000 20. Sc. int. 267. 80.*

There is another set of cases, where a Legacy is given provided the Legatee marry with the consent of certain persons named in the Will. This condition is void & the Legacy is taken independently

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thereof. If the Legacy be limited over to another person, & the first Legatee marry without the consent of the person named in the Will, this restraint is binding, & the second Legatee takes the Legacy.  
16 Cent 199, 1 Atk 502, Pre. Chy 565, 1 Forb 249, 252, 3 Bac 488.

### Where a Legacy is well given.

1<sup>st</sup>. A last will being made when the Testator is presumed to be in op<sup>o</sup> Consilio, the Law regards the intention rather than the technical import of the words used to express the intention. Therefore any words manifesting an intention to give or create a Legacy are sufficient. Indeed there are cases where a Legacy is good tho there be nothing particular about it - as if a Testator expresses himself in these words - "I give & bequeath my silver watch besides my cloak to A. B." here the cloak is impliedly given. You are told "the intentions of the Testator must govern in all cases" but there is this restriction, clauses to be added "provided it is not contrary to Law". By this is not meant, that technical words must be used in a will, without which another instrument might be void - The intention is to govern, unless that intention be to do or have done that which is illegal. The intention is the polar Star, which being found the construction will follow it, ~~and~~ provided it be not contrary to Law. 2 Vern 467. Godd 281.

2<sup>d</sup>. In all description of persons who claim as Legatees, the intention of the Testator is not to be sought for.



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ger; and it always has been adjudged that if a man gives his estate to Children, & he had none, Grandchildren would take under the description of Children. But grand children are considered as Children in no other case. 2 Vern 106. 2 Ves. 206.

If a man devise Legacies to all his Children & Grand Children, this extends only to those who were in esse at the time the will was made. But Judge G. thinks this must depend upon the intention of the testator, if that can be ascertained. If a Stranger devise to Children it would certainly only go to those in esse. But he thinks if a Parent gives in this way it would extend to those afterwards born. The Authorities however are contradictory. Suppose a man devise property to his Children, & A had none at the time the will was made, it could not vest at all, if it would go to those afterwards born. Dyer 177. Co Litt 112. Pre Chy 476.

It is sometimes impossible to get at the intention of the testator; as where he leaves property to be equally distributed among his relations; or his poor relations; or among his relations of a good moral character &c. In such case it has been adjudged, & the rule is now perfectly settled, that the property shall be distributed according to the Statute of distribution. the description is too general to have any efficacy. Pre Chy 401. Talb. 281. 2 Ves. 527. 2 Vern 381.

Property is sometimes given to Children to be distributed according to the direction of some particular person named in the will. this will is good; & the dis-

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distribution made by the person appointed will be binding unless it be manifestly unjust & monstrous; in which case they will interfere, viewing him as a trustee, & direct the distribution. 2 Vern 421. 5 B.

3<sup>d</sup>. It is said by Godolphin (272. 273) that in order to find out the testator's meaning, with respect to the things which he meant to give away, it is necessary to regard the time when the will was made. for it was presumed the testator's mind was not altered, unless it otherwise appeared by sufficient evidence.

In another place however he observes, that this rule must be understood as the testator makes use of the words, in the present or future tense. & that if it be doubtful, whether they refer to the time past or to come, they shall be understood to relate to the time to come. But it is now settled that a gift by will of all the testator's personal property, operates on all he had at the time of his death, & no more will pass, whether the amount of the personal estate be increased or diminished after the time the will was made. The rule respecting real property is directly the reverse, for only what the testator has at the time of making the will, will pass by it.

But say you the intention of the testator in y<sup>e</sup> first case may very frequently be defeated. the answer is that personal property is so transitory, that it would be difficult to ascertain what he had at the time of making the will. The rule therefore is adopted as the nature of the case will admit all testators who



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about to make their wills are supposed to know the rule. The reason however which governs in case of personal property, apparently ceases in case of Real property & therefore the rule is the other way. 1 Salk. 237. 2 Ves. 638. Swinb 418.

There are contradictory auth<sup>s</sup> as to this point. viz. whether a bequest of all a man's personal property at a particular place, extends to all he may afterwards have in that particular place. There is one thing certain that if the bequest were of a specific thing, as e.g. a Chair, at a certain place, & this Chair say should be taken away or worn out &c., tho' there is another of the same kind there, the latter will not pass - but the first one will pass whenever it can be found, even tho' it were not in the specified place at the time of the testator's <sup>death</sup>. The Contrariety in the first case depends upon & may be settled by this rule - that if the words are general, all that he had at the time of his death would pass if he bequeathed the property at a particular place - unless as above mentioned with respect to a thing specified. 2 Ves. 688. 638.

### Where a Legacy shall be a Satisfaction for a debt or duty.

The following rule once obtained, but Judge St. supposes it does not hold now. It existed in Chy for upwards of a century. It was this. If a man gave a Creditor a Legacy it sh<sup>d</sup>. be considered as a Satisfaction of the debt, if it were equal or superior in value to the debt. tho' not otherwise. 3 P. W. 533. 2 St. 132. M. Chy 240. 294. 1 Ves. 124. 2 Vern 177. Repin 163.

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It was supposed this rule was supported by the intention of the Testator - & on this supposition it stood for a long time undisturbed. But, succeeding Chancellors rejecting this supposition, wished to take particular cases out of the grasp of this rule, by laying hold of something in the will. And now by repeated adjudications it is virtually abolished. The first thing which gave a wound to the rule was "that the Legacy in order to operate as an extinction of the debt, should be *ejusdem generis*, i.e. as the debt was in money, no ~~debt~~ Legacy except a pecuniary one would discharge it - a Legacy in Goods w<sup>d</sup>. not do it.

Auth<sup>y</sup>. to & exception that it must be *ejusdem generis*, 2 P. Wms 616.

1 Ves. 521. 263. 2 Ves. 409. 636. Pre. Chy 236. 3 P. Wms 226. n. Pre Chy 299.

2<sup>d</sup>. A case turned up where the Legacy was as good as the Debt, they were *ejusdem generis* - but not to be paid at the same time. Chy declared the case out of the rule, for they said a debt must not only be *ejusdem generis*, but also payable at the same time & at least as soon as the debt, to be operative upon by the rule. 3 Atk 46. 2 Ves 636. Pre Chy 236.

3<sup>d</sup>. A Legacy was given of *ejusdem generis*, & payable at the same time, but Chy found on looking over the will that the Testator had said, "after all my just debts are paid," & therefore suffered not the rule to operate. - 1 P. Wms 410. Repor 168.

4<sup>th</sup>. Next there came a case not only *ejusdem generis*, payable at the same time, & much greater than the debt, but it was also without any clause



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directing it should be paid after all just & legal  
debts - the test is not sufficient the rule to act upon it  
because the Legacy was an illegitimate child.

1 Bro Chy 389. 2 St. 526.

5<sup>th</sup> Afterwards a case turned up with all  
the qualifications before mentioned to bring it within  
the rule: but nothing appearing on the face of the  
will evincing an intention in the testator that the  
Legacy should cancel the debt. Chy. w. not suffice  
it to be cancelled, & declared the rule should not opera-  
te unless sufficient did appear on the face of the  
will from which an inference might be drawn  
that the testator's intention was such. 2 P. W. 555 &c.

6<sup>th</sup> Lastly Chy declared the debt sh<sup>d</sup> not  
be cancelled unless the Legacy was expressed to be for  
the debt - then the intention is clear. This is now  
the settled Law. 2 Bro Chy 526.

If several Legacies be given to one person  
exactly alike in quantity & quality, & in the same  
instrument, they are not cumulative the Lega-  
tee will be entitled to only one of them - it is consid-  
ered as a repetition - a mistake. But if it were  
given in different instruments, as by adding a Cod-  
icil, it w<sup>d</sup> be considered cumulative. The Legatee  
will take both or as many as there are, unless  
a contrary intention in the testator may be fairly  
inferred. 1 P. W. 433, 423. 2 H. Bl. 213. 1 Bro Chy 389. 2 St. 526. 2 Ald.  
636. Twinn. 529.

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In *Conant*, a man undertook to dispose of his estate himself. he said he would have no will, he executed notes &c. and among others he gave an illegitimate daughter a bond for \$1000; afterwards he thought perhaps death would overtake him before he could get thro, & supposing he could make a short will sooner than finish his notes &c. he got the man who was assisting him in writing to make a will as he sh<sup>d</sup>. direct in that will he gave this same daughter \$1000. Now these were two distinct instruments within the rule - but the circumstances attending it, w<sup>d</sup>. lead us to believe that he intended she should only receive one of the sums. but the Ct. determined she sh<sup>d</sup>. have both. as the man who drew the will swore that at the time of drawing it he told the testator of the bond for 1000 & his answer was, "no matter, this is a bounty to make up for my negligence in educating her."

The rule remains as it was, with respect to provisions made in the will for a wife or other person entitled to money from the testator by articles of marriage settlement - as if a man had left his wife \$400 in the will & he had previously entered into a marriage settlement bond to that amount it is considered as a satisfaction of the debt. She cannot take both, tho she may have her election as to which she will take. *3 Ves fr 53. Bro. Chy. 263. 138. 10 Ves 95. 2 St. 115. 555. 1 P W. 424. 2 Ves 349. 639. 1 Bro. Chy. 305.*

A gift to the Legatee by the testator during his life is to be considered as a part of the whole gift.



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Legacy bequeathed by the will made previously to such gift. As if a man makes a will & therein bequeaths a daughter £1000. Sometime afterwards the daughter gets married in the life time of the Father and he gives her £1000. and then dies before he alters the will. This Legacy is considered as paid. Another case where a man gave a Legacy of 300 £ to his son, & shortly after making the will, he purchased a commission for his Son, & paid 750 £ for it. This was considered as a satisfaction in part of the Legacy, & the Son had only a demand of 50 £ on the 24<sup>th</sup>. It is not every little advancement that is to be considered as a part satisfaction for the Legacy - it must be something of consequence - as selling a Son up in business. *Pre Chy 263. 1 Vera 95. 2 St. 115.*

## Of the Ademption of Legacies.

The Ademption of a Legacy is the taking away of a Legacy before bequeathed. This ademption is always to be proved & never to be presumed. *3 Bac 470. 7. Twiss 522.*

There are certain cases where the intention of the testator, that the Legatee should not have the Legacy, is apparent; i.e. that the Legacy is adempted. but in other cases it is more difficult to ascertain it. The accidental destruction or the alienation of a Legacy may be an ademption or not according to the circumstances; but it is not necessarily such; for tho the Legacy be specific, it may be replaced by a similar article. *3 Bac 470. Smith 522.*

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To determine whether there be an ademption or not, recourse must be had to the intention of the testator for the intention is here the governing principle. 205. T. Ray. 25. 335. 1 Eq. Ca. ab. 304.

When the alienations cannot be accounted for, but upon the supposition that the testator intended to receive the Legacy, it is an ademption. But if the Legacy be so lost, destroyed or disposed of that any other intention may be inferred it is no ademption. 2 Vern 631. 431. 2 Bro Chy 608.

If a debt be bequeathed to the testator called in for no other purpose than to take it away from the Legatee, it is an ademption. 2 Vern 681 1 Eq. Ca. ab. 302. T. Ray. 25. 35.

If the thing bequeathed, be pledged or sold by the testator, through necessity, it is no ademption. And if the payment of a debt bequeathed were absolute i.e. the person comes to him & voluntarily pays it, or if the Debtor were in failing circumstances, or if the testator were in want of money the receipt of the Debt is no ademption. But in this case the heir is answerable for the value of it. 1 Wils 378, 2 Wils 320. 144. Simbler 401. 2 Wils 309. Forster 228. Cooper 35.

So in many cases where the Legacy was destroyed, or where a house bequeathed is consumed by fire & a new one erected by the testator in its place, there is no ademption, the Legatee is to take the accidental destruction (as unless) may be an ademption or not according to the circumstances. 2 Wils 325. Cooper 36. Forster 228. Sainsb. 234. 6.



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If a man by will gives his Daughter \$1000 and afterwards in her marriage gives her the same or a greater sum, the Legacy will be extinguished. 2 Vern 115. Pra. Chy. 263.

If the testator bequeath a certain sum to one of his children, & in the same instrument give of same sum over again. it is but a repetition of the former. Swinb. 536.

It is laid down as a rule. however to be rebutted by shewing a different intention that if the bequest be of goods &c. specified to be in a particular place, they must be there at his decease to give effect to the Legacy. But the removal of goods out of a place before the testator's death is no ademption. You must in all cases infer from the intention & conduct of the testator whether it is an ademption or not, as there can be no certain rules laid down. 4 Bro. Chy 537. Cooper 37-9. Bro Chy 129 note.

## Of Administrators refunding Legacies.

There are cases where the Legacy must be refunded, if debts afterwards appear. There is no time limited by the Engl. Law when debts must be brot in. In some of the States they have made wise regulations on this head, which render the Law in some measure safe. But as there is no time limited by the Engl. Law, the executor might pay out Legacies & afterwards debts might be brot in, which he would be obliged to pay out of his own pocket. The executor is not obliged to

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to pay any Legacy till the Legatee gives security that he will refund in case debts afterwards come in. For as we have before remarked, no time is limited, within which creditors must exhibit their claims to the estate of the deceased. And even where there is a limitation in some of the States, debts may arise that the Exor will be obliged to pay, & therefore bonds are necessary to guard us things of that kind, as in the case of Warranty - the Exor is the one to look to. he is liable. 2 Ves. 358. 2 Vern 205.

If a Legatee on receiving his Legacy has not given security to refund in case debts sh<sup>d</sup> afterwards appear, he is not compellable to do it afterwards, according to the Books. 2 Vern 205. Chy Cas. 146. 1 Vern 90. 60.

This rule however does not operate if the Exor when he paid the Legacy was ignorant of the existence of debts afterwards appearing, or if he be compelled in Chy to pay them. 2 Vent 360. 2 Ves. 193. Sonc 210. 190 219. 3 Bacc 453.

Judge Reeves says the Equity of the rule appears to him incorrect - it appears like imposing a penalty on the Exor for his negligence. There is no rule more true than that creditors must be paid before Volunteers. He says there is no need of the interference of Chy. - that he thinks an action for money had & received would lie, as the money is paid thro mistake. The Exor paid it thinking he had assets - being a mistake the consideration fails of course. In some late decisions the opinion of 2<sup>d</sup> & 3<sup>d</sup> Chy is

2<sup>d</sup> Chy Cas.



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where the Question came up collaterally, suppos. the rule to be incorrect. There can be no Du. in principle but he ought to refund.

Remember the principle that Creditors must be first satisfied: Now suppose the Legator is satisfied & the Creditor is not satisfied. There is no Du. but the exor is answerable to the Creditor but can the Creditor come on the Legatee? It is generally true that in such case the Creditors only remedy is at the Exor. but there are cases where the Creditor may come on the Legatee, i.e. in the assets of the debtor in the Legatee's hands. This is where the exor is unable to pay. being insolvent. then the Creditor may file his bill in Chy & compel the Legatee to refund. Suppose there are several Legatees must the Creditor come upon all of them, & compel each of them in Chy to refund? The principle is that the Creditor must be satisfied & he may come on one or all of them. if he come on one, then this one may come on the other Legatees so that still the procuriary Legatees shall refund alike. their Legacies shall abate according to the deficiency of assets. 2 Ves. 193. 1 Vern 94. 2 B. 205. 4 Vent 308. 1 Vern 31. Cro E. 467.

It has been a Du. whether if a Legacy be given to an Exor for his care & trouble, it sh<sup>d</sup> not stand on a higher ground than other Legacies but it does not. it has no preference. if sufficient it must abate in the same proportion with others. 2 Vern 424.

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(Where the Exor has been mistaken & paid the other Legacies, one who has not been paid, may compel the other pecuniary Legatee to refund, where the assets become deficient, tho there were no provision for refunding, & altho he may still come on & Exor & compel him to pay it out of his own pocket, if he voluntarily paid the assets to the other Legatee. But in some cases he cannot come on the Exor, as when he was compelled by Chy to pay the other Legacies. Then his remedy is to come on any one of the <sup>pecuniary</sup> Legates.\* Whether one specific Legatee can compel another to refund in part is really a *questio verata*. E.g. Suppose there were five specific Legacies given, & for the want of assets to pay debts the Exor is obliged to take one of these specific Legacies. Now every sound principle must induce us to believe that the others ought to make it up to him in proportion, as it was taken to pay a just debt. The Authorities are contradictory. The following is the ground, on which they go to prove that the others ought not to refund him. "That in case this specific Legacy were accidentally lost, the Legatee must bear that loss, & that he is no worse in this case." But says Judge Henry, this does not seem to be within the principle when it is applied to pay a just debt. It is shown by Dec. rev. *Lowmire*. For & *affirm*. 19. W. 422. For & *neg*. 2 Chy. Cas. L 170.

\* See Chy. Cas 136. 248. 2 Vent. 360. 3 B. R. till "refunding Legacies." Paper 112



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### (The Payment of Legacies.)

To whom is the Exor to pay a Legacy? Why to the Legatee, if he is sui juris. The Exor should be careful in the payment of Legacies, to take a proper receipt, or to have a sufficient voucher to show that he has paid it, because it is holden to be such an executible demand, that it cannot be barred by the Stat. of Similitations. To be sure by length of time a Legacy may be presumed to have been paid; & the Exor. may avoid the repayment, as if the Legatee should call for his Legacy 10 years after it was due. The Legatee was in low circumstances, had often met the ex'or, & they had transacted business together, & had had frequent settlements. These circumstances w<sup>d</sup> be presumptive evidence that it had been paid. See Chy. 228. Vern 256. 2 Vern 21484. 1 Vesf. 571. Roper 101.

The Exor sh<sup>d</sup> be careful to pay the Legacies into the proper hands; for if the Legatee be an infant, & has no guardian, the Exor cannot pay the Legacy to the Father or other relations of the Infant, without the direction of the Ct. of Chy. The reason is that every guardian must give bonds to execute his trust faithfully, & in case he fails, the Bondsman is liable. But if Chy direct it to be paid to the father, they always take bonds & then the Exor is safer. If the Exor pay it to the father without their direction, he does it at his own risk, & in case it never comes to the heirs who he may be compelled to repay it. There is an instance of this, which seems a very hard case. A Legacy was

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left to the Son of a Gentleman in London a very wealthy man whom no one could suspect. The Exor. paid the Legacy over to the Father. Some time afterwards the Father & Son entered into partnership in merchandise very largely, they failed & became bankrupts. The assignees found the Legacy had never been paid to the Son, & came upon the Exor & he was compelled to pay it over again. Chy Cas. 240. 10th 283. 5 Co. 29. 18. 3 Jac. 485. 189. Cas. 16. 300. Tolls R. 103.

If a Legacy be given to a feme covert it must be paid to the Husband. it is not like other choses in action. But if it were given to the sole & separate use of the wife the rule does not hold. he then has no control over it. When a Legacy was given to a feme covert, who lived separate from her husband by agreement, & the Exor. paid it to her & took her receipt, it was decided on a bill brought by the husband that the Legacy with the interest sh<sup>d</sup> be paid over to him. So where they are divorced a mensu et thoro the case is the same; it has been adjudged that the husband alone can release a legacy left to the wife. But the Law raises, is the wife being separated from the husband & unable to receive the Legacy, to have nothing on which to subsist? the answer is the Law presumes he has settled as alien on her. 2 Vern 281. Cro. E. 908. 3 Jac 485. 189. Cas. 165. 12 Mod 891. 2 Vern 659. Rep. 46.

If no time be appointed in the Will for the payment of a Legacy, it is payable at the end of a year from the testator's death which time is presumed



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necessary to settle the estate. The Ct. may prolong this time for a good cause shown. This rule of the Eng<sup>l</sup> Ct of Chy is copied from the Civ. Law. 18. W. 996. 2 Palk. 418. 2 Bro Chy 39. 2 P. Wms 88. 2 S. 2 22. Refus 95.

Where a Legacy is vested to the Legatee die, it is to be paid to his representatives at the time appointed in the original payment. 2 Vera. 31. 199. 283.

The Person who is entitled to a Legatee Legacy may demand payment immediately after the death of the first Legatee, provided a year & a day be passed & no time be fixed by the Testator. Tiden. (See second page.) Judge Reeves observations on this.

### From what time Legacies carry interest.

If a Legacy be devised generally, it is regular-ly to carry interest from the expiration or end of the first year from the death of the Testator. But if the Legatee be of full age & neglect to demand it at that time he cannot have interest but from a time of the demand. I have therefore remarked the difference between a Legacy & a Debt, the latter of which bears interest from the day fixed for payment whether demanded or not. The reason of this difference is that the Exor who is a trustee is not like a Debtor bound to search for the person whom he owes, it is sufficient if the Exor advances the property in his Trust when demanded. Popham 104. Remember the rule above contemplates the Legatee to be of full age, and also observe that when the Legatee is a child & the Exor does not the Exor search for the Legatee and pay him in

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in the same manner that the Testator was bound to do? the ground for an answer is that the testator is not a Debtor to any one, nor ever was. he is only a Trustee, and only to fulfil his trust when required. I mean when the persons are capable of making that requisition, being sui juris. 2 Atk 109. 2 P Wms 106. 2 Ves & 387. 2 Eqh. 104. 2 Salk 415. 2 Vern 251. 262. Naper 68.

But tho' a Legacy be devised generally, & no time limited for the payment, yet if the Legatee be an Infant, he shall be entitled to interest from the end of the first year after the Testator's death, tho' no demand be made because no laches can be imputed to an Infant. 2 Salk 415. 2 Vern 251. Pre Chy 161. Dow 209.

I have thus far been treating of General Legacies. but now of those payable at a particular time as if the Legacy be appointed by the Testator himself to be paid at a certain time, say 3 years. It is not fully settled whether it shall bear interest from the time so fixed for payment, or from the demand. modern authorities favor the latter hypothesis they seem to view it as in the case of a General one. & say it must be demanded. Judge H. inclines to the latter opinion, tho' the Auths. are contradictory. 1 Salk 415. Pre Chy 11. 161.

The general rule is that no interest is to be paid till the time a Legacy is demanded, or the time fixed by the Testator when it shall be paid. but there are exceptions. If a Legacy be made payable to a Child, by the testator at a future time, and no other



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Other provision be made for its maintenance, the Law says it shall bear interest from the end of the year immediately following the death of the Testator. And it were not payable in 10 years the reason is that it is the Father's duty to maintain the Child while he lived, & it is presumed that he intended it should be maintained after his death. 1 Eq. Ca. ab. 301. 2 Atk. 329. 3 Atk. 101.

If a Legacy be payable out of a fund which bears interest, (say it is payable 4 years hence), if the interest is not received by the Exor, the Legatee receives it with the interest, & in case the Exor has received the interest he must pay it over to the Legatee.

By Stat. money made payable at a certain day, bears interest from the time fixed for payment.

## How Legacies are recoverable.

In Eng. the method of recovering Legacies, is by a Bill in the Ecclesiastical Co. or by a Bill in Chy. If the Legacy be charged on Lands, it is recoverable by filing a Bill in Chy only. But in this Country it depends on the provisions made by the particular Statutes. Chy. enforces the payment of it, tho' personal property or ground of trust. But in this Country we have no Ecc. Cts. & the Exor may be sued by the Legatee in our common Courts of Justice. 3 Wyl. 937. 5 T. R. 690. 1 H. Bl. 108. Comf. 284. 289. 291. Salk. 313. 6 Atk. 226. 279. 7 T. R. 667. Ald. 143. 2 Shaw 50. Palm. 100. Lord. 279. 284.

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### Of Residuary Legatees.

A Residuary Legatee is the person appointed by the Testator to take the residuum after the debts and Legacies are paid. Then he is a Legatee. Hence when the debts & other Legacies are paid & discharged, such Legatee if any be appointed by the Will, will take the surplus to the exclusion of all others; except in cases where Legacies are payable out of real Estate, and they are unpaid - here he has no claim - they go, or lapse for the benefit of the heir. 2 W. 276. Atk. 552. 2 B.C.

If a Residuary Legatee die before the debts are satisfied, so that it does not appear to what the surplus would amount, yet the Exor or Adm<sup>r</sup> of such Legatee shall have the whole residue of the personal Estate which remains over, & not the Exor of the first testator. So if there be a Residuary Legatee, & the Exor omits part of the testator's effects out of the inventory, or undervalues those he puts in, the Residuary Legatee may file a Bill of discovery vs him, before he has paid the Testator's debts. 3 B.C. 484. Carth. 52. Palm. 409.

When there is no Residuary Legatee, the Exor is considered as such. In what cases the Exor is entitled to the surplus, & what difference is made by having a Legatee life him, we have considered already under another head. But if no residuary Legatee be appointed under the Will, & the Testator's intention be manifest that there sh<sup>d</sup> not be residuary Legatee, the residuum must be distributed as tho' the Testator had died intestate. 1 W. 4. 550. 3 H. 40. 2 Inst. 33. 1 Vern 473. 2 H. 674. 737.



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### Donatio causa Mortis.

A donatio causa mortis is no part of the Will. nor has the Exor any thing to do with it. It is a specific present made by a person in contemplation of Death. It is always conditional, for if the donor recover, the donee is not entitled to the property. It is never good as to Creditors, if it be wanted. tho' it is good as to the Donors Representatives & Exors. It differs from a common gift because it is always conditional. of course if the donor die, the legal right to the donation vests immediately in the Donee, without the intervention of the Exor or any other person. To give effect to this kind of gift, there must be a manual tradition of the thing given, or some act amounting to it, so that the donee might get it. It is necessary to recollect that a donatio causa mortis is not good as to Creditors, but no action lies to the Exor in this case, he not being entrusted with the gift. See Chy. 269. 1 P. W. 408. 441. 3 H. 307. 2 Str.

Now then shall the Creditor, who claims to the donee get it? Judge Reeves says he must bring his action to him as Exor in his own wrong for the Exor has nothing to do with it. The Representatives of the Donor are bound by the gift and the Exor in such a case put us in other cases intending the property to the donee to recover it.

A Chase in action of a negotiable nature may pass as a Donatio causa mortis. If it be not negotiable the weight of opinion is, that it will not

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pass as a donation &c. Some however say it may pass  
to of the latter opinion is Judge Rivers. The reason given  
why it sh<sup>d</sup>. not pass is that the donee cannot recover  
if the obligor refuse to pay. But the person may be  
willing to pay, & if so it is immaterial whether the  
note be negotiable or not. The only reason why it  
should not pass is for fear the donee might be defrauded  
of his remedy. But Judge Rivers thinks that Chyler  
protect the assignment, & ought to direct the Ex<sup>r</sup>  
(he being indemnified) to allow the donee to bring an  
action in his (the Ex<sup>r</sup>'s) name. 10 P.W. 441. 3 P.W. 342. 357.  
3 Hk. 216. 2 Vesey 431. is all I saw.

## Distributions.

After payment of all debts the Admon<sup>r</sup> is bound  
to make distribution of the personal property, to those  
whom the San has pointed out. See Ch. 70.

The mode of Distribution is settled in Eng<sup>d</sup>. by  
the Stat. 22. & 23. Car 2<sup>d</sup>. and in most of the States in U.S.  
they have similar Statutes, founded upon & growing out  
of the Eng<sup>d</sup>. Stat. Understand this Stat. well, & you will  
never be at a loss. a partial understanding of it, is of  
no service. - it sh<sup>d</sup>. be understood perfectly.

There are certain terms made use of in this  
Stat. & those copied from it - therefore when we use the words  
of the Eng<sup>d</sup>. Stat. which have a definite meaning, we must  
be governed by the construction which they have put up  
on them in their laws. The Stat. directs that after  
the payment of Debts, & the widows share, the <sup>surplus</sup>



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plus shall go to the Children & their Representatives.  
No representative is admitted among collaterals, viz. Sisters & Brothers Children. So that these terms, next of kin and legal representatives had received a known construction before they were adopted by our Statutes, & we are bound by that construction. There are 2 modes of computation but as the Ecclesiastical Cos. had the management of deceased person's Estates, the rule of the Civil Law was adopted to determine who are the next of kin points out in the Stat. of Distributions. Next of kin must be understood in the same sense, whether applied to Real or Personal Property. These persons who take are Stat. Legatees. The distributive share vests in the kindred of the Deceased at his death, & of course is transmissible to their representatives, tho the claimants sh<sup>d</sup>. die before the distribution. So under this Stat. a distributive share of property vests in an infant in ventre sa mere. Now need not enter into <sup>the</sup> metaphysical dissertation, whether it vests in the infant while in the womb, or at its birth. it is of no consequence. this we know, that a posthumous Child is as well entitled as one already born. See 66. 2 D. c. 429 & 249.

No distribution is made till after the expiration of one year from the death of the intestate. The personal Estate first goes to the next of kin in the descending line & their legal Representatives, i.e. to Children & their issue ad infinitum, before it can go to those in the ascending or collateral line. 3 D. 11. c. 66. & 2 D. c. 210. See Chy. 28. And this is the Law thro' all the

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The States: To explain who next of kin & legal Rep<sup>s</sup> are. -  
Say J. I. dies leaving 3 children, A. B. & C. they are next  
of kin only, but say A is dead & has left 2 children, E.  
& F. now D. & E. are the legal Rep<sup>s</sup> of A. & will take what  
he w<sup>d</sup> have taken had he lived out of the estate of J. I.  
But say A. B. & C. are all dead & left F. G. & H. children of  
C. left I. J. K. & L. children. then representation is at an  
end. D. & E. will not take what their father w<sup>d</sup> have ta-  
ken, but all the grand-children viz. D. E. F. G. H. I. J. K. & L.  
take alike, they are now next of kin & take per capi-  
ta. and remember that so long as any of the old stock  
remains (a part being dead) in any of the lineal degrees  
the Estate goes per stirpes, per representationis. But  
after the old stock is extinct the estate is distributed per  
capita & not per stirpes among their children - or in  
other words when all the claimants are in the same  
degree they take per capita. but if some are more  
nearly related than others, they take per stirpes.  
Now observe I said (supra) that after the old stock is  
extinct the estate is distributed per capita & no other  
way. Some however contend that the distribution in  
this case is per stirpes. Doublais agrees to the rule.  
Judge H. supposes that when there is no representa-  
tion, as in this case, the distribution cannot be per  
stirpes. See Douc 71. Bro. Chy 34. 2 Bac 429. 1 Lewis 282.

If persons related in equal degree to the de-  
cent, no preference is given except that those in the  
descending line exclude those in the ascending & col-  
lateral line, whatever may be the degree of kindred.



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In the Civil Law proximity & not quantity of blood is regarded in calculating the degrees of kindred. 1 Vent 316-23.

The Jus representationis extends among collaterals no farther than the Children of Brothers & Sisters. Beyond this degree, children can claim in their own right only. To explain say Tom Dick & Sally are all the Brothers & Sisters, being the next of kin. Tom is dead & leaves children, then these children take by representation. But say the Brothers & Sisters are dead. Dick left two children and Sally one - and these children of Tom Dick & Sally are also dead leaving children, then these children are next of kin & take as such - representation is at an end. 1 P W 25. 544. 3 H. 50. 1 Salk 259, 2 Co 2030. 1 A (1459). See Chy 54.

There seems to be one thing which mars the symmetry of the Eng Law, that the Grandfather is excluded by the Stat. from taking with Brothers & Sisters. The same rule obtains when the brother is dead leaving children, they take in preference to the uncle & the Father, tho they are back in the 3<sup>d</sup> degree. As if there are 2 Brothers, Tom & Dick. Tom is dead leaving children, they take the same that Tom w<sup>d</sup> take, tho they are in the same degree with their uncle who is excluded. The reason is that they take per representation. Now if Tom & Dick were both dead, then their children take as next of kin, & they being in the same degree as the Uncles, they all take as next of kin not by representation.

I have said the right of representation extends

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no further than to the Children of Brothers & Sisters. If then the Brothers & Sisters of the propositus be dead, & no part of their children also, those nephews & nieces who survive, shall take the whole estate to the exclusion of the grand nephews & nieces of the propositus, i.e. to the grand Children of the Brothers & Sisters of the propositus.

A Stat. of James 2.<sup>d</sup> places the Brothers & Sisters in the same rank with the Mother, both in the second degree, in the distribution of personal estate. But this degradation of the mother takes place only when there are Brothers & Sisters & their Children living. 14th 455.

In the distribution of personal property, no distinction is made between the whole & half blood, the Civil Law which regulates the distribution regards proximity & not quantity of blood. 25BC 14th 455. 10me 316. 323. Styles 74.

If a Father of a person deceased be living, the mother takes nothing, because whatever she might take w<sup>d</sup> belong to her husband. but if it were of her property then she w<sup>d</sup> take one half. If after a divorce a rehabilitatio matrimonii by Parliament for supererogant causes, the Son die, his Father & Mother being still alive. It is to be said it is doubtful whether the mother w<sup>d</sup> be entitled to any thing or not. But as the Father's right to her personal property has ceased, in this case it w<sup>d</sup> seem that on principle she w<sup>d</sup> have a good claim. If the divorce were only in causa & there she w<sup>d</sup> not claim any of the personal prop<sup>y</sup> of her children when the husband was living, because the husband's right to her prop<sup>y</sup>



## Exors & Adminors.

property still continues, tho' after her husband's death she might. And in cases where the marriage was not absolute, void, she is entitled to a share after the death of her husband. The Brothers according to the English adjudications as I remarked before take to the exclusion of the joint parents; but are these decisions reconcilable with the governing rules? does not this mar the symmetry of the Law? 3 Atk. 726. 2 Vern. 4. 308. 253. 2 Bc.

Children in ventre sa mere are by the Civil, as well as by the C. L. considered as born in life & capable of taking property according to the rules of descent & distribution, & in favor of such an infant, an injunction may be granted to stay waste. 2 Atk. 115. Pre Ch. 50. 2 Vern. 274. 710. 711.

If there is a Widow left, & there are any in the descending line, she takes one third of the Estate; if there are none in the descending line she takes one half of the Estate, i.e. when distributed among the collateral kindred. A perfect knowledge of the Stat. of Desc. is of great importance. It will enable us not only to understand the distribution of personal property of which we are here treating, but of Real property also. Remember that when the claimants are in equal degree, they take as next of kin, they take per capita, but when they are not of equal degree, they take per stirpes.

N. B. the following pages included in brackets [-] was copied from the judges notes, & in some measure is a repetition of what has gone before relating to the Statute of Distribution. &c. -

## Errors & Admissions.

[That the mode of computing kinship adopted by the Ct. in Eng. as well, in Chy as in the Eccl. Cts. under the Stat. of Distributions is the same as adopted in the Civil Law, and that this mode is correctly stated in the preceding pages, will appear from all the authorities. In 1 Wils 334, & 335, it is laid down by the Chancellor that the rules of computing kindred under the Stat. are the rules of the Civil Law. & the preceding mode of computation is there stated to be the only correct method. The context in that case was between the Grand-daughter of a Sister, & the Daughter of an Aunt, both being in the 4<sup>th</sup> Degree according to the computation of the Civil Law & an equal distribution was decreed.

The same doctrine is recognized in 1 P. Wms 41 and 2 Ves. 214. Sir John Strange observes the rule, in computing the degrees of proximity of blood, must be taken from the Civil Law, & on this ground & foundation stand all the cases, which have come in judgment: since the Stat. of Distributions either at Law or in this Ct. In Pre. Chy. the same doctrine as to the mode of computation is laid down in language that cannot be mistaken. So too the same rule is laid down in 2 Bl. C. 515 to 520. See also 2 Vera 335. 1 P. Wms. 25. 595. 2 Atk 118. Hard. Es. Litt 23<sup>b</sup>. Don. in Wills 18

That the distribution is to be made in the descending line, sometimes *per capita* & at others *per stirpes* as before stated, see Love <sup>74 & 75</sup> in Wills, where he maintains this as the rule. So too this doctrine is recognized in 4 Burns Eccl. Law, (see where Love quotes Burns & gives the <sup>Page</sup> and it is no where controverted. The rule as there laid down is on the supposition that



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the intestate's Children are all dead, whether those children were two or three or more, each of them having life children, as it may be, one of them two, and three or more - in this case where there are only grand children their fathers & mothers having, respectively died in the life time of the said father, the grand children take in their own right, & not by representation of their father or mother deceased, & the Ct. where distributions are cognizable, will order an equal distribution to be made - & thus it wd. be, if there were only great grand children of the deceased, both his children & grand children having died before him.

That Posthumous Children take an equal share with Brothers & Sisters see 1 Ves. 156, where it is declared by the Chancellor that it was settled Law, that a posthumous Child sh<sup>d</sup>. have a distributive share of the intestate's estate. This point was also settled by Lord Hardwicke in the case of Wallis & Hodgson in 4 Burr 506. L. 365. & 2 Atk 115. Analogous to this doctrine was the determination of the Ct. in the case of Miller & Turner in 1 Ves. 85. in that case it was determined that a posthumous Child, was within the provision in marriage articles, for such children of the marriage as should be living at the death of the Father or Mother. - The Chancellor observes that a posthumous child is considered in life in many cases - in all cases relating to his advantage he must be considered as en vivo according to the Civil Law. So also in the Statute of Distributions he is considered as living.

That

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That when all the claimants are in the same degree, they take per capita, & when some of them are in a more remote degree than others claiming only as Repres<sup>s</sup> to others, the distribution is per stirpes as before ment.<sup>d</sup> See 2 Ves. 215. where the Chancellor says it is now settled that the Children of one Brother stand in the place of the Parent in sharing with the other Brother & take per stirpes, yet if no Brother is alive, representation in loco parentis is at an end. If there be one Brother living & another has left Children however many, they take but a moiety with the Brother, but if that brother be dead, all in the same line of equality take per capita. So it was determined in Bro Chip 54. where A. had 3 Brothers, who were dead at the time of his death, one left 2 the other 3, & the last 4 Children, that the distribution of A's Estate among his nephews & nieces should not be per stirpes, but per capita, & that they all sh<sup>d</sup> have equal shares without any regard to what their parents would have taken, for they did not take by Representation but all as next of kin in equal degree. 3 P. Wms 58. The Que. was whether the personal Estate of Lord Dover sh<sup>d</sup> be distributed per capita or per stirpes - he left only nephews & nieces, one nephew by his Brother & three nephews & 2 nieces by his Sister the Chancellor decreed they all should take equal share per capita & not per stirpes.

In 10 P. Wms 595. the Chancellor says, An intestate die leaving a deceased Brother Child 8 & 10 Children of a deceased Sister the 10 Children of the deceased Sister sh<sup>d</sup> take 10 parts out of 11. The same doctrine is found in 10th 455.



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That Representation among lineals continues ad  
in finitum See 1 E. 11<sup>th</sup> 2<sup>nd</sup>.

That repres<sup>n</sup> in the collateral line cannot extend be-  
yond Brothers & Sisters Children, to let in their Grand Children  
to take as long as any of their Children are living See 1 E. 11<sup>th</sup> 2<sup>nd</sup>.  
25. This was a case where the intestate left a Brother's  
Child - a Brother's Grand Child. The Brother's Grand Child was  
not admitt<sup>d</sup> to a distributary share, for there are but  
two ways in which a person can take the personal es-  
tate of the intestate. viz. either as next of kin, or by  
Represent<sup>n</sup>. The Grand Child of the Brother cannot claim as  
next of kin, for he was one degree more remote than  
a Brother's Child, & he c<sup>d</sup> not take by Represent<sup>n</sup> for the Stat<sup>ute</sup>  
declares there shall be no Represent<sup>n</sup> beyond Brothers & Sis-  
ters Children, & here he was a Grand Child, one degree too far.

So too there is no Represent<sup>n</sup> in the 4<sup>th</sup> degree. 10 E. 11<sup>th</sup> 59<sup>th</sup>.  
where it was decreed by the Chancellor that where the in-  
testate's relatives were an uncle & a Child of a Deced<sup>ent</sup>  
uncle the Child should not take with the Uncle for he  
is in the 4<sup>th</sup> degree, to which Represent<sup>n</sup> does not extend. The  
construction of that clause of the Stat<sup>ute</sup> which says  
that "there shall be no Represent<sup>n</sup> among collaterals beyond  
Brothers & Sisters Children" means that no one shall take  
by Represent<sup>n</sup> but the Children of Brothers & Sisters. See 2 Vern 283.

In 2 Vern 168. there is a case which seems con-  
trary to this doctrine, but this is not now considered  
correct. The rule is as before C. decess. See it overruled  
in Pre. Case 28.

That all who are in the same degree of kindred  
take

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takes equal shares where there is no right of representation see 2 Ves. 210. where the Aunt was admitted to take equally with a nephew & niece. they were all in the same degree viz. the 3<sup>d</sup>. See the same doctrine in 1 Atk. 454. &c. where the only relatives of the intestate were the grand daughter of a sister & the daughter of an Aunt, they shared his estate equally, being both in the 4<sup>th</sup> degree of kindred.

That a strict adherence has been observed by the High Cts. of distributing to the next of kin according to the computation of kindred by the civil law is evinced by the following authorities. One Day 525. where the Grand mother being in the 2<sup>d</sup> degree was preferred to the Aunt who was in the 3<sup>d</sup> degree. The same point was adjudged in 1 East 257. & 1 R. Wms 41. The Great Grand mother takes equally with the Aunt thus being both in the 3<sup>d</sup> degree. 2 Ves. 215.

I know of no departure from this rule or principle except in the case alluded to before of preferring Brothers & Sisters to the Grand Parents when they are both in the 2<sup>d</sup> degree.

That relations of the half blood, take equally with those of the whole blood, the personal estate of the intestate see 1 Vern. 637. where the Chancellor observed that before the case of Smith & Peary, determined in the 28 Car. 2. which was argued after making the Stat of Dist<sup>n</sup> the Ct gave but an half share to the half blood. And in Virginia and some of the other States this Stat. gives but an half share to the half blood, but since that case the matter was settled that they sh<sup>d</sup> have an equal share with the whole blood. In 1 Vern 400. it seems to have been the opinion of the Ct. that



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the half blood should have only an half share, but that is not now law, for since that time it has been settled in the House of Lords upon an appeal, that the half blood sh<sup>d</sup> have a whole share, equal with those of the whole blood, reported in 2 Vern. 124. The same is to be found in 1 P. Wms 530 & 531.

That the distributive share on the death of the intestate vests instantly in the person who has a right to it, see 2 Atk 118. where it is apparent that the Chancellor considered a child in ventre sa mere as a person in esse in whom the estate may vest. This opinion is confirmed by the opinion of <sup>the Court</sup> in 13 Atk 229 who held that a devise to such child was good. 3 B. & A. in Chy in favor of such child may be best to stay waste. 2 Vern 710.

There appears to be a distinction made in the Civil Law, between a child in ventre sa mere in esse & one that is only conceived, the latter is non animas: this distinction I believe has never been admitted in the Eng. l<sup>y</sup>. it is certainly a very nice distinction. But it is not difficult for the most skillful to determine satisfactorily that such child is non animas. Such child stands in need of a provision arising from a distributive share as much as any other posthumous child. In the 3 P. Wms <sup>note D</sup> we find it laid down that where a person entitled to a distributive share under the Stat. dies before distribution which cannot be made until a year has elapsed after the death of the intestate, yet his share is vested in interest & transmissible to his executors & assigns. So too where if the son dies leaving B. the father who was entitled to his estate, & B. died before distribution. A's estate did not

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go to his next of kin, but to the next of kin of B. in whom the Estate was vested before distribution.

That in the ascending & collateral Line all who are next of kin whether on the part of the father or mother are entitled to an equal share see 1<sup>st</sup> W. 53. No preference is given to males over females, nor any greater respect shown to relations on the side of the father, than to relations on the side of the mother.

That previous to the Stat. of Jac. when the father was dead & the mother living she w<sup>d</sup> take the whole Estate being the only person who was in the first degree, see 4 Burns Ec. Law 349. & Dove on Wills 74. It is true that when the father is living the mother takes nothing, even if the father or sh<sup>d</sup> die before he had reduced the distributary share, if in choses, to possession - but they w<sup>d</sup> go to his Exors. This casts light upon a Qu. in some measure disputable, whether choses that accrue to the Wife, during coverture, can ever survive to her, when her husb<sup>d</sup> has not reduced them to possession, since a distributary share under the Stat. could not survive to her - by parity of reasoning no other chose, as a Legacy &c. which accrues during coverture can survive to her on the death of her husband.

That since the Stat. of Jac. 2<sup>d</sup> the mother does not take, in exclusion of Brothers & Sisters & their repr<sup>s</sup> but takes an equal share with them as a brother or sister or seems to stand up the Children of deceased Brothers & Sisters to the 2<sup>d</sup> degree to take by repr<sup>s</sup> on no other ground in the case of Stanley vs Stanley be reconciled with other decisions where all the Brothers & Sisters were dead leaving children.



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and the Uncles being in the same degree with them claimed a share but were excluded. for in this case the mother was living, who now constituted part of the old stock, as much as if she had been a Brother or Sister. if the mother had been dead the uncles & aunts must have shared with the nephews & neices, for so were all the cases. 2 P M<sup>s</sup> 344. 1 Atk 458. 2 Ves 214.

The Stat. 29 Car 2. altered the situation of a deceased wife's estate, for by it choses in action which are not rendered into poss<sup>n</sup> remain hers. the husb<sup>d</sup> must be appointed Adm<sup>r</sup>. to the extent of assets he must pay debts like any other Adm<sup>r</sup>. not as husband. & he is to take any residuum. The origin of it was this. under Stat. 31. Edw 3. the nearest & most lawful friend was to be appointed & then he came in. then the Stat. Hen 8. said to the widow or next of kin. the practice still continued of granting Adm<sup>n</sup> to him. then under Stat. 22 Car. he must distribute to the next of kin. but he is not next of kin. then Stat. 29 Car. altered this. said the husb<sup>d</sup> should enjoy the estate. Suppose Adm<sup>n</sup> is not granted to the husb<sup>d</sup> but to another. still the estate is his for the Stat vests it in him. And in all the States where there is a Stat. 29 Car. the husb<sup>d</sup> is entitled to the estate. Where there is no Stat. 29 Car. but one of the 22 Car. he must distribute to the next of kin, he not being next of kin - his marital rights are not affected. 2 Bl. 504. Croc. 100. 1 P M<sup>s</sup> 351. 3 Atk 525.

Cases & Answers.

Cases distributed.

- Case 1<sup>st</sup> I. died leaving a Wife & three Children.  
Answer. one child goes to his Wife & the remaining two children to his Children, each taking one equal share.
- Case 2<sup>nd</sup> He left no Wife, but three Children.  
Answer. The Estate is divided per capita among the Children.
- Case 3<sup>rd</sup> I. died leaving 2 Children & the son of a third child who is dead.  
Answer. The two Children take each one third & the grand child the remaining third, as representative of his Father.
- Case 4<sup>th</sup> I. died leaving a child C. his child A. is dead, who left a child D. & his child B. is dead leaving E. & F.  
Answer. In this case C. the child of I. takes one third, being issue of the dec<sup>d</sup>. D. his grand child takes an other being the legal rep<sup>se</sup> of his Father A. & the other 2<sup>nd</sup> is divided between the Children of B. as his heirs is. For representatives take per stirpes & not per capita.
- Case 5<sup>th</sup> I. died & his three Children are dead, but A leaves a child D. B leaves Children E. & F. & C leaves child G. & H. I.  
Answer. The old stock being extinct, representation ceases & of course the Children of A. B. & C. take per capita, all standing in the same degree.
- Case 6<sup>th</sup> I. died leaving two Children. B. & C. his child A. is dead & so is A's child D. who leaves K. & L.  
Answer. The Children B. & C. take each 1/2 & K. & L. the remaining third, as Representatives of their grand Father A.
- Case 7<sup>th</sup> I. died & left a Widow, but no issue his father, mother, his mother Mary. This Mother's Sisters of the whole blood from Dick. & Sally. & the half blood Sam & Silas and



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- Answer.* Susan Roe, & his Uncles George & Edmund Stiles  
 This wife takes one half of the estate according to 3d Statute.  
 there being no issue, & the Father the other half.
- Case 8<sup>th</sup>.* The only relations living are Tom, Dick & Sally, brothers  
 & Sisters of the whole blood, Sam Stiles & Susan  
 Roe, brother & sister of the half blood & his uncles  
 George & Edmund Stiles.
- Answer.* The Brothers & Sisters of the half blood & of the whole  
 blood take the estate per Capite in exclusion of the Un-  
 cles, they being in the second & the uncles in the 3d degree.
- Case 9<sup>th</sup>.* The same case as the last only Sam & Susan are  
 dead without issue & so is Tom dead but he left  
 a Child M.
- Answer.* Dick & Sally are entitled to two thirds of the estate  
 being the next of kin to the Decedent. M. the child  
 of Tom is entitled to the other third being the le-  
 gal Representative of his Father Tom.
- Case 10<sup>th</sup>.* All the Brothers & Sisters of J. S. are dead except  
 Sally. But M. the Child of Tom and S. & O. the  
 children of Dick are living.
- Answer.* In this case Sally takes one third of the estate as  
 next of kin. M. the legal Representative of Tom  
 another third and S. & O. take the residue, being the  
 legal representatives of Dick.
- Case 11<sup>th</sup>.* All the Brothers & Sisters of J. S. are dead. Tom left  
 a Child M. Dick left Children S. & O. and Sally life.  
 S. & O.
- Answer.* In this case the stock being extinct, representa-  
 tion ceases, & therefore the Uncles of J. S. viz George

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and Edmund, together with the Children of Sam.  
Dick & Sally, divide the Estate per capita, being  
all in the 3<sup>d</sup>. degree of kindred.

Case 12<sup>th</sup>. Same case as the last only George & Edmund the  
Uncles are dead without issue.

Answer: Here M. N. O. P. Q. R. being the next of kind, divide  
the Estate per capita.

Case 13<sup>th</sup>. This same as the last, only M. is dead leaving 1. 2. 3.

Answer: Then N. O. P. Q. R. take the whole Estate in exclusion  
of the Children of M. because representation  
among collaterals, extend no further than the third  
degree.

Case 14<sup>th</sup>. M. is dead leaving 1. 2. 3. So N. O. P. Q. are dead -  
N. leaving 4. (i.e. Figure 4.) P. leaving 5. 6. - P. leaving  
7. 8. 9. and Q. leaving 10. (i.e. Figure 10.)

Answer: R. takes the whole Estate as next of kind, to the exclu-  
sion of the Children of M. N. O. P. Q.

Case 15<sup>th</sup>. R. is dead leaving 11. 12. 13 & 14.

Answer: In this case the Children of M. N. O. P. Q. & R. divide  
the Estate per capita, being the next of kind to the  
deceased.

Case 16<sup>th</sup>. George & Edm. and life issue viz. George life 15. &  
Edmund 16. & 17.

Answer: The Children of George & Edmund share the Estate  
with those of M. N. O. P. Q. R. being all in y<sup>e</sup>. same deg<sup>re</sup>.

Case 17<sup>th</sup>. The only relations living at S. P.'s death are his  
Grandfather Solomon, & his Brother Tom.

Answer: According to the general rule Solomon & Tom w<sup>o</sup>ld  
divide the Estate equally. but this is an exception.



## Exors & Admins.

and Tom inherits the Estate in preference to the Grand father Solomon.

Case 18<sup>th</sup>. J. S. died leaving his Grand father Solomon, his brother Tom, and his Mother Mary.

Answer. Had it not been for the Stat. 1 Jac 2<sup>d</sup> the mother would have been entitled to the whole Estate, being in the first degree, but now she is entitled to an equal share with Tom. The Grand father Solomon is excluded as in the last case.

Case 19<sup>th</sup>. Same case as before only Tom is dead with issue.

Answer. The Mother takes the whole Estate, for the Stat. does not operate as her only when there are brothers & sisters of the propositus, or the legal representatives living.

Case 20<sup>th</sup>. The only relation of J. S. is Tom, but his sister Sally is born after his death.

Answer. Tom, & Sally take the Estate per capita, for posthumous children are considered in esse, & take equally with others.

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Distribution is compellable in Chy. 2 Com 204.  
Murn. 134. 2 Vent. 362. 1 Com 254.

Real Property is always to be distributed according to the Laws of the Country, where it is situate, but personal Property is to be distributed according to the Law of the Country where the Intestate resided at the time of his death. 2 H. 38. 406. Amb. 25. 2 Ves. 35.

## Executors & Administrators.

### Actions by and vs. Executors.

In some cases the Testator or intestate might have been sued, when the Executor or Administrator cannot. There are also some cases in which the testator or intestate might be sued, but in which the Executor or Administrator cannot. The rule of discrimination between these cases in which the Executor or Administrator may be sued on account of the Testator, & those in which he may not, has been laid down thus - "that the Executor or Administrator, is liable for the contracts, but not for the torts of the deceased". But neither branch of this rule is strictly true, for there are cases in which the Executor &c. is not liable for contracts of the Testator &c. & others in which he is liable for his torts. The rule now established as to torts appears to be this - If the testator or intestate has benefitted his estate by the tort, the Executor or Administrator is liable, but if the estate has not been benefitted, the action does not survive vs the Executor &c. over the estate of the party against whom the tort has been committed by the tort. In cases of Slander, Assault & Battery, an action cannot be brought vs the Executor, the right dies with the Testator &c. - No action for malice, or any thing of that kind can survive vs the Executor or Administrator - thus far the rule seems to be a true one. But Judge H. says the rule ought to be established in a different manner - he thinks the inquiry ought not to be whether the assets have been benefitted, but whether another has been injured. But whatever may be our opinions about what ought to be, the Law is as laid down in 8. rule.

H.C. the Executor or Administrator was not liable for any tort committed by the Testator &c. but now you see, he is



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liable for some. There was a Stat. made in 4 Edw. 3. which made the Ex'or &c. liable for trees the Testator had carried off. *de usurpationibus arboribus in vita Testatoris*. By Equity this Statute was extended to all torts committed <sup>not</sup> properly generally. 2 Edw. 439. 445. 1 Com. Di 241. 1 Vent 30. Semb. Sat. 188

In the old roll. the word is "arboribus". but the word in the printed Statutes is "bonis". Que. does this Stat. impose a liability on Ex'ors & Adm'ors, or merely give them a right of action? Cowp 372. 3 T. R. 549.

Judge Reeve remarks that in the same way that we got that law, making Ex'ors &c. liable according to the Equity of the Stat. we have got a great deal more. Of course the rule is, that if the Estate is benefitted by the tort, the Ex'or or Adm'or is liable - so where a man has got the property of another tortiously into his possession, the Ex'or or Adm'or is liable - his Estate is benefitted.

There arises a Que. where a right of recovery for the tort of the Testator &c. survives to the Ex'or &c. how are you to sue the Ex'or? will you sue him for a tort? The Ct. have determined that the action lies to the Ex'or &c. shall not sound in tort but in Contract - and the usual mode of recovery is by Assumpsit which cannot be traversed. The same judgment support an action for a tort, will also support one on Assumpsit. But to support an Indeb. ass. the property must have been sold, or not to be found, so that a sale will be presumed. For it remains in the Ex'or or Adm'or's hands. It will lie as either. (not as Ex'or or Adm'or but as joint Debtors to the Testator). 1 Vent 30. 4 Mod 603. 2 Ray 971. 1833. 514.

## Exor's Admors.

If an action which w<sup>d</sup> survive w<sup>d</sup> an Exor. be lost as the Testator, & be depending the suit, the action does not abate. Cowp. 372. Cro. E. 377. Salk. 168. 2 Co 87.

It is in this case the action be such as w<sup>d</sup> not survive it must abate. If therefore an action be lost, & the Testator be on a right of recovery which w<sup>d</sup> survive w<sup>d</sup> the Exor. & the action survives in law, the suit must according to the strictness of principle abate, & the plff must resort to an action sounding in Contract w<sup>d</sup> the Exor. And when the action as well as the right of recovery is, such as will survive w<sup>d</sup> the Exor, it does not abate by the Testator's death - a sci. fu. must issue to summon the Exor. to answer the suit. The Testator's name is erased from the record & the Exor. is put in. To a sci. fu. w<sup>d</sup> the Exor. he cannot plead any matters, which might have been pleaded in the original action. If no Exor. is appointed nor Admin. the plff must wait till there is one. Salk. 2. Cro. E. 283. 1 Sid. 182.

It has also been said that there are some contracts which will not survive w<sup>d</sup> the Exor. 12 Mod. 429

The rule of discrimination in this case is, that when (as is usually the case) the contract is such that the Testator has received, or is to receive any consideration from the other party, on performance of the contract, the Exor. is liable. But when according to the contract itself the Testator was not to receive any consideration moving from the other party, but a compensation arising solely from the performance of the contract, & in which the other party was not interested, if he fails of performing the



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more negligence his Exor is not liable. As if an officer who is to receive legal fees, for the execution of a process fail thro' negligence to execute it &c. Formerly no action survived vs the Exor in those cases in which the testator might wage his Law. Cro E. 600.

### When may an Exor maintain an action.

Can the Exor maintain an action in all cases where the Testator could? No. there are many cases where he cannot. He can maintain no action, tho' the Testator could, for Slander, Assault & Battery &c. 2 Sac 445.

The rule is, if the tort committed vs the Testator has injured his assets, the Exor may maintain a suit for the recovery of damages, otherwise he can not. You then see the reason why the Exor can't maintain an action for Slander &c. it is because the assets have not been injured: unless it be proved that some special damage was occasioned by the Slander, which can rarely be done. Cro E. 377. Latch 168. 9 Co 87.

When a suit is commenced by the Testator & he dies before judgment what is to be done? The enquiry is, w<sup>th</sup> that suit have survived to the Exor if the Testator has not commenced it? If it w<sup>th</sup> the Exor may make himself a party to the action, by suggesting the death of the Testator, entering his name instead of the Testator on the record. There was no provision made by C. E. in cases where a suit is commenced & the party dies, but by Stat. 1 W. Mary of the suit. & have been maintained vs the Exor, & the Def<sup>t</sup> dies, his Exor must be notified by issuing a sub. fa. to make him appear in which case he becomes a party to the suit, & judg<sup>t</sup> pres vs him as Exor. Cro E. 377. Latch 168. 9 Co 87.

## Exors & Admors.

And in case it is an action that we have survived, & it is commenced & the office, the Exor may enter his name, in the rooms of the Testator. vide Stat. Supra.

If the plaintiff died & the Exor neglects to enter his name, the Def. is to be remedied. This is certainly a *casus omnis*. The Plff is provided for, he may keep the suit alive after the death of the Testator if he pleases, but if he does not the Def. is remedied. Cro. E. 377. Satch 168. of Co 87.

I have already observed that the Exor may sue in his own name, when the cause of action is founded on a contract of his own, or has occurred since the death of the Testator. As suppose at the death of T. his horse came into the possession of A his Exor, & T. H. borrowed that horse, now A the Exor may bring the action, either in his own name or as Exor, but when he recovers it is a pl. in T. H. 260.

The Exors duty we know is to make a defence to all unjust claims. But is the Exor when sued by a creditor of the Testator, obliged to take advantage of certain positive Statutes, which in Equity are not binding on him. or in case he does not shall he be liable for a devastavit? I find a case in 1 Atk. 526. where Mr. Chancellor Hardwicke says he is not obliged to take advantage of the Stat. of Limitations. Judge Harris's opinion is that the Exor is not obliged to take such advantage, but if he thinks it prudent it is in his power to go vs him, without being guilty of a devastavit.

Whether the Exor is obliged to take advantage of the Stat. of Limitations, is a Que. concerning which the English & H. disagree. They say that the Exor is bound to



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to take notice of its being unlawful. But Judge. Case  
supposes the Exor may pay the principal & legal interest  
if he pleases without being guilty of a default. But  
it is a Dec. Hob 107. Ord. in case 105. 106 Nov. 129. 2 Bar 431.

It is settled that in general he is obliged to advise  
himself of any illegality in the consideration of a Contract.  
But it is doubted whether this rule extends to debts which  
in honor & conscience ought to be paid. The Exor is not  
perhaps warranted in retaining all those legal advantages  
when his testator might.

It is determined that if the action be one of  
those where a man may sue, a Count for money had &  
received to the use of the Exor as such may be joined  
with a Count for money had & received for the use of  
the testator. 3 T. R. 559.

But a Plaintiff cannot join in one declaration, a  
cause of action which accrues to him as Exor with  
one which he has in his own right. 3 T. R. 489. Shaw 1371.

You will find this in the Books, "If that for which  
an Exor does sue, when recovered, be up to him in his  
hands, he must sue in his Representative capacity".  
This is laid down too broad. Does it mean that the  
Exor is in all cases of this kind to sue as Exor, and so  
the rule means that unless he sue in this way he is  
liable to costs? It cannot mean that he is obliged to  
sue as Exor, nor is he exempt from paying Costs in all  
such cases. Judge. Case says the rule is not so. that he is  
not obliged in all cases to sue as Exor. 2 T. R. 123. 4th.  
350. 206. 234. 358. 1 Shaw. 57. 3 Bro. P. C. 550.

## Exors & Admors.

It has been said that when a promise is made to an Exor as such, he cannot sue as Exor, but must sue in his own name. Judge St. is unable to discover the reason of this. There has been a late determination to the contrary. 10 N. 487.

Suppose an Exor or Admor as such bind himself by debts. Suppose he had assets. I will say it is not into writing. now is he personally liable? he is bound to pay & cannot plead plene administravit. But Judge R. doubts the principle of the rule. Where is the consideration? Is the Exor or Admor bound in conscience to pay? If it were a sealed instrument, we all know he would be bound by it, for the very sealing is a consideration in Law.

If an Exor sue & is defeated, it is a general rule that he is liable for the costs. The origin of it is this. At E. S. no person was liable for costs. but by Stat. Hen 8<sup>th</sup> which governs on this subject, those only were made liable to costs who sue in their own right. This therefore extends not to Exors & Admors. They do not sue in their own right, but in under writ. In almost all the States, they have Statutes making them liable. 2 Benc 446. Sta 682 vent 92. 6 Mod 94. 181.

But the last rule applies only to pliffs who are Exors. But. 64. Cro & 503. Hard. 166. 17 Lon 185.

There is however one case in which an Exor or the Plff shall be liable for costs. This is when a large disaction is his own right, as a false conversion or trespass upon his own time. Sta 682. 6 Mod 94. 181. vent 92.



## Exors & Admors.

If one of two or more Exors die, the Survivors may act, for it is an office & not an authority.

### In what mode you proceed vs an Exor.

A Judge rendered vs an Exor for a debt of the Testator first gave us the goods & chattels of the Testator in the Exors hands, & not vs the body of the Exor - if the Exor pays, all is well. But suppose he will not pay - a non est inventus is returned in the Execution, & no date on which to levy, you then issue a sci fa. just did on the former judgment. But remember that vs this the Exor can plead nothing in defence, that he might have plead to the first action - i.e. he cannot go back of the Judge. But he may plead any thing which has happened subsequently, which would go to destroy the right of recovery. On no sufficient defence being made Exor then goes vs him personally de bonis propriis. He has precluded himself from pleading no assets - because such plea he might have put in to the first action. (Salk 2. Cro. 283.)

1 Sid: 182.

### What things are Personal Property and Assets intermedios.

It is a general rule that all personal property goes into the hands of the Exor & the Real into the hands of the heir. Yet there are some things which seem to be personal property which go to the heir, & on the other hand some which appear to be Real which go to the Exor. Thus Dower in a Curia bene valuerat go to the heir. They are considered as Real Property.

(over Admors.

The rule is the same as to fish &c. - One, but if the  
Beasts were no longer feræ naturæ, but had been tamed,  
they w<sup>d</sup>. have gone to the Exor. On the other hand the  
annual rent of Land seems to be personal property -  
but it is not - it is accruing. The right is an incorporeal  
hereditament & goes to the heir, while Crops growing  
at the death of the testator, which seem to be real, as so  
covering of the earth pass into the hands of the Exor. Em-  
blements are sometimes considered as real & sometimes  
as personal property. They pass of course by a devise of the  
Land, & if an injury be done to them, it is a trespass. But  
as between the heir & Exor, & also between the Landlord  
& tenant, emblements are always regarded as pers-  
onal property when the estate determines at an uncer-  
tain time. (See title of "Real Property," pages .) There  
is one species of Estate which the C.D. does not provide  
where it shall go - and that is the residue of the residue  
of an estate, per autre vie - as if A holds an estate for the  
life of B. and A dies. Now the crops growing in man-  
is personal property & goes to his representatives - but  
how is the residue of the estate to go? The grantee can-  
not have it again - the Exor cannot take it for it is  
Real Property, and the heir cannot for it is not inheritable.  
If one it seems is entitled to it. See the Stat of Cal. pro-  
vides it shall go to some great Lord of the Fee. (Mr. Justice  
says that C. Statutes 29 Car. II. c. 14 & 111. the tenant per autre  
vie may dispose the estate for the life of B. if he will & if he does  
not it will pass in a course of distribution among his Rep.  
See Law 86. Inst 41. 2 R.C. 255. b 261.) Co Litt. 55. 68. 2 ISC. 145. 123.



## Execs & Adminors.

As between the heir & Ex on the emblements, you will remember are always regarded as pers. Prop<sup>y</sup>. There have been different opinions as to Woods, where this yet seems uncertain, for the dignity of them they will tell you wounds the freehold. But Judge Tice believes it is settled by Blackstone (no one contradicting) & since his time that like all other emblements, or annual artificers profits they go to the Ex. 2 Bos. 123.

By the old Law every thing affixed to the freehold, no matter how slightly was considered as part of the freehold, or realty, & went to the heir. But the rule is now clearly reversed - for whatever is merely affixed to the freehold is regarded as pers. Prop<sup>y</sup>, & its separation w<sup>d</sup>. materially injure that to which it is so affixed - not regarding trifling injuries or separating them as drawing a nail by which a Scotch ing-plug was suspended. This rule is now established, holds equally between San lord Tenant & heir & Ex<sup>or</sup>. Ad Saw. Exp. De. 594. Sta. 1142. Bull. 34. New San. 2 Bos 416 & 20. 3 Atk 113.

Certain personal chattels called "Heir Goods" are by the custom of Eng<sup>d</sup> permitted like real prop<sup>y</sup> to descend to the heir. If a testator or intestate die possessor of a Term for Years, it belongs to the Ex<sup>or</sup> or Admin<sup>or</sup>. If a Lease for years come to the hands of the Ex<sup>or</sup> he must annually add to the Inventory the surplus if any, after allowing for payment of Rent - & the rule is the same with respect to all accruing profits. They are a sale in his hands. If a testator seized or had made a Lease, the rent on his Death goes to his heir - it is a sale in his hands. All reversions

## Ex'rs & Admin's.

reversions, however distant, are real assets in the hands of the heir, & Execution may go for him immediately to collect when the reversion happens. Equities of Redemption on the Testator's mortgages, are, in Equity, real assets in the hands of the Testator, but not at Law. If the Testator grant an estate in reversion & annuity, the future estate of the heir is assets when it shall happen. If the Testator be mortgaged, or receive an estate in reversion, the estate at his death is assets in the hands of his Ex'rs. & he may compel a foreclosure. The Heir in this case may also compel a foreclosure, if he will pay the money for which the Land is pledged, but otherwise not. 1 Vern 412. 2 Ch. R. 220. 186. 283.

That species of Pers. Propy. called "paraphernalia" regularly does not go to the Heir in reversion. The first kind of Paraphernalia, never vests in the Ex'rs. The second only, in deficiency of Personal assets to pay debts, not Legacies. This subject is considered under the title of "Dower & Home"

## Of Advancement.

By Stat. Car 2<sup>d</sup> every child except the Heir at Law if he has received an advancement from the Father during his Life shall in case to be entitled to a distributive share under the Stat. of Distributions, bring what he has thus received into the common stock, which is called "throwing it into Hotchpot." (an ancient name for pudding) & that with the rest of the Testator's estate must then be distributed to him & the other children in equal parts. If a child in the life time of the Father has received more than a distributive share of the estate, he may retain it



## Errors & Amendments.

he is not to deliver it up. Remember that no gift is  
 kept one made by the father is considered an advancement.  
 If a child has given a child some so much it is not his  
 for his father's distributive share of the father's property  
 - it is no advancement. This rule of advancement applies  
 only in those cases where the father dies intestate as to  
 the whole of his property. & therefore if he die intestate  
 as to part only of his personal property, a child advanced by  
 him in his life time need not bring such advancement  
 into hotch pot in order to have a distributive share of  
 the part as to which he dies intestate. Co. Litt. 1. b. Pres.  
 Chas. 1. c. 1. Willes 440.

Many things which I shall mention are not  
 advancements - but whatever is given for a marriage  
 settlement, whether real or personal is an advancement.  
 So all deeds of lands, or money to set up a child in life,  
 are to be considered as advancements and if the donor  
 has said in the body of it "for value received", if it can  
 be proved that no value was received, it is an advance-  
 ment. 2 Wils. 485, 2 Bos. 430, 2 P. W. 434. Ey. Cas. ab. 244, 2 Vern 638.

No small trifling sums of money, or any little  
 present, or property a parent may give his child, are  
 to be considered as advancements also - such as spending money  
 in buying a horse. In Eng<sup>d</sup> giving a child a living is  
 not considered as an advancement. But it is  
 different in Amer<sup>a</sup>. So also in Eng<sup>d</sup> where a sum is given  
 in with an apprenticeship it is not considered as an ad-  
 vancement. 3 P. W. 317, 2 B. 638 141. Ey. Cas. ab. 244 2 Vern 638.

There is a singular exception to the Law of ad-

## Exors & Admors.

advancements in Eng<sup>d</sup>. which is, that an advancement by the mother of one of her Children, shall not bar him taking an equal share with the others under the distribution. Therefore whatever a Child gets from any other person, than the father, is not an advancement. Take this as the rule. 2 P. Wms 356.

It seems that the doctrine of advancement does not prevail in cases, where a man has property of which he is ignorant, or which he does not notice in his will. See Chy. 170.

Where a man made a will of part of his property & died intestate as to the rest, one Son had a much greater Legacy than the others, they contended that the Son who had the Large Legacy could not take a distributive share of the property, as to which the Father died intestate, without bringing that Legacy into the common stock. But the Ct. decided otherwise. this Legacy is not in the nature of an advancement for an advancement must be made in the life time of the Father. 2 P. Wms 44.

## Of Administration Bonds.

Every Admor must give bonds for the faithful discharge of his trust. By the Eng<sup>d</sup> Law Exors are not to give Bonds, but Chy. may compel them to give Caution, i.e. security, thus being trustees, whenever it appears necessary for any good cause thereon. Statute 316. 2 Wms 356. Court 457. 5 Wms 381. Showen 299.

No person can be an Admor until he is 21 years of age.



## Errors & Advisors.

of age, & the reason assigned is, that before that age he cannot give bonds. 5 Co 29<sup>a</sup> 3 Bac 121. Comth 446. Salk 39. S. Ray. 338. But Judge Reeves, remarks as he did before, that this is not a sufficient reason, for when bonds are required of an Infant Ex'or; they are binding, notwithstanding the principle of the C. S. 1 Fonb. 76. Burr. 1802. 5 Cooper 27. 5 Ib. 87. Co Litt. 72. 315.

What then is the nature of this Bond? for what is the Adm'r liable? Why the Condition is, 1. That he will make a true inventory of the Estate of the Intestate, as fast as it comes to his hands, & exhibit it to the Ct. at the appointed time. 2. That he will not embiggle any of the Estate, but render a just account of the same to the Ct. 3. That he will dispose of the Estate as the Law directs. If he does not inventory, or if he makes a false account, or does not account he forfeits his bond. This Eng<sup>t</sup> Law says the Bond is not forfeited for nonpayment of debts. tho you see it is in case he does not inventory. Neither in the Eng<sup>t</sup> Law do they consider acts amounting to a devastavit, to occasion a forfeiture of the bond. tho an action lies, as you will see under the next head. But if the Adm'r neglects to make a distribution, it is a forfeiture of the Bond. 1 Salk 316.

## Exors & Admors. Devastavit.

Any act or negligence of the Exor or Admor, by which the assets are lost or injured, subjects him to a devastavit - he is answerable for what he has wasted of the assets. He is not liable for any loss which may come to the Assets, provided he use ordinary care in their preservation & keeping. If he has not used this degree of care he is liable, & is considered as having committed a devastavit. Nor is an Exor or Admor answerable for any misjudgment - as where the Exor refused a certain sum offered for goods in expectation that they would rise in value but they fell - this w<sup>d</sup> not subject him to a devastavit, for he wished to do the best he could. In honest diligence ought to be used. He is liable generally, as I have before said, only to the amount of assets, but if he embroyles or thro' carelessness suffers the property to be destroyed, he is liable for a devastavit, on which execution goes out de bonis propriis. He is not liable on the footing of assets, but for what he has wasted. Other things may amount to a devastavit, as if he voluntarily pay an inferior debt when there is a superior one unpaid, & there is a deficiency of assets. He is not liable in all cases for not converting property left him to be disposed of into money, but there must be a reason for it - as that it c<sup>d</sup> not be sold to advantage. To create a devastavit there must be some wilful or negligent misconduct. 2 Bac 431. 11 W 424.

While Penalties were recoverable at Law in  
inf.



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Exor. if he is released the obligee on receiving the principal & interest of a bond which was forfeited, without receiving the penalty, he was in times of technical mania guilty of a devastavit. But they intended, & chancing down this penalty - they said he had no right to the penalty - & almost all the States have done the same. Cro. 496.

To submitting to arbitration amounts to a devastavit if the award is not just, but Judge Reeve questions whether a rule so rigid as this should be enforced. Cro. 43. 2 Sum. 40.

If an Exor this could pay a debt which has already been paid, it is a devastavit - If an Exor in selling the goods of his Testator suffers a loss through want of that care & diligence which an ordinary careful man would use, he is liable for a devastavit.

The payment of an usurious note has been considered a devastavit, though Judge Reeve thinks it would not be so considered where the principal & legal interest were only paid. If an Exor pay a debt barred by the Statute of Limitations, it is a question whether it would be a devastavit if it were a just debt. Judge Reeve thinks it would not be so considered. Hob. 167. Ord. 105. 116. Reg. 1. 129. 2 Mac 431. 1st Ch. 526.

A devastavit is always considered as a wrong or injury done to the creditor - the Exor is answerable only as far as he is liable if he has paid out.

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all the money he may please please to invest it. -  
Where goods are lost not by the error fault, he may  
be sure by a condition please please to administer, and  
give the loss in evidence. In case of a devastant he  
may be charged on the bond.

When there are several errors the act of one  
is not only his but the whole. As affords in the hands of  
one is affords in the hands of all. Thus I mentioned  
before - but if one of them commit a devastant he  
only is liable - one is not liable for the devastant  
of another, unless he has directly or indirectly con-  
tributed to it, for a devastant is in the nature of  
a trespass.

As to the remedy the modes in the different  
States in the U. S. are not alike. Some of them are  
according to the English mode. Suppose A dies  
leaving his estate of C. the plaintiff please administer  
therein as in that place, i.e. he shows he has paid  
out all the affords he has - notwithstanding I know  
as a person of C. & D. - but he can never get a sci-  
re facias de bonis propriis. but there is a judg-  
ment & it may be satisfied if property after  
come in - the judgment is not rendered at D. the  
estate of C. is the hands of the C. & D.

But how are we to know when there is  
a devastant? Why you take an execution  
give it to the sheriff - he goes & returns with it as  
"nulla bona" & that there is a devastant - this is  
one way - but are you to take his word that  
there



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there is a devastavit? No. On this return a Sci. fa. issues suggesting the devastavit - the Ex or the com. in rem prove that there is no devastavit - if he fails to prove this, then judge goes vs him de bonis propriis - but if he succeeds there is an end to the suit - another mode is, the Shff. does not return a devastavit but merely "nulla bona" - then you suggest on the record of the Court that there was a devastavit - after that a writ of Enquiry goes out, the Shff. summons a jury to enquire into it and if they return there was one then a deere facias may be issued, all ~~there~~ one as if the Shff. had returned a devastavit - the Ex. may traverse that or not as in the former case. Cro E. 527. Cro E. 350. 1 Dyer 210. 5 Co 32.

Judge Cullen says he saw this mode in the Reports of some of the neighboring States - "Bring a suit for the Ex., when he pleads plea in abatement or admit it, & then reply devastavit again." - this seems a reasonable one, & he does not see how it might not as well be tried in this as in any other way - the trial then is to be "devastavit vel non" - this is certainly much easier than the English mode, -

If there be two Exors, one having assets & the other none, & the former commit a devastavit both may be sued in the first instance in the usual form, & judgment may go vs both. But if no assets be found, non est will be returned,

Causes & Admirs.

a seire facias will go vs both, then Judgment will  
go vs the Receiver only if both Exors have signed  
receipts, & one only has in fact, receiver both are li-  
able to creditors, but the receiver only to Segatees. Butts.  
318. 2 Buc 114.



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## Difference between the Law of Conn<sup>t</sup> and the Eng<sup>l</sup> Law.

The Law of Several of the States says Judge W.  
is nearly the same as that of Conn<sup>t</sup>.

By the English Law the personal property is the  
only fund out of which debts can be paid except the  
said & specially debts. In Conn<sup>t</sup> not only the person-  
al property but also the Real property of the decas-  
ed is a fund in the hands of the Exor for the payment  
of debts. but the personal is first subjected. then  
the Real in order of the Ct. of Probate.

In the Eng<sup>l</sup> Law some debts are preferred  
to others, so that on deficiency of assets, some par-  
ticular debts will go wholly unpaid. but in Conn<sup>t</sup>,  
no preference is given - debts have no priority, ex-  
cept debts due to the Public, and sickness debts as  
well as funeral charges - these must be paid tho  
there be nothing left to pay the other debts - all oth-  
er debts are paid *pari passu* - On a deficiency all  
the assets being averaged proportionally among  
the creditors of all kinds.

When the Exor is apprehensive the Estate is  
insolvent, he must apply to the Ct. of Probate, who  
will appoint a Committee - i.e. authorize three  
judicious persons to appraise all the property of the  
deceased, of which it is the Exor's duty to make an  
inventory & also to adjust all his accounts. allow  
such debts as are just & legal, & reject all others,  
which they have full authority to do: & on the appraisal

Chas. J. Simers.

if the property & the adjusting of the accounts, the Estate proves insolvent, the Ex<sup>r</sup> may take the property, or the appraisers & the Ct. of Probate having struck the average, pay it out of his own pocket, & he may sell the property & the assets the more than the appraisers shall be appropriated to the payment of the debts, and if there be a residue it shall be exercised in paying Legacies & distributed according to the Stat. - if the Sale of the property does not amount to the appraisers at the average must be proportionally reduced. New Estate being discovered after the average is struck, the Ex<sup>r</sup> must go forward to the Ct. of Probate & get an order for a new appraisal of the Estate, at which he must inventory, & the proceedings are the same as before. The Estate discovered must be made good if it proves still insolvent - if not the debts must be paid & the residue disposed of according to the will of the deceased or as the Ex<sup>r</sup> directs - This mode of appointing Commissioners, & averaging &c. is very reasonable in every respect, except that these Commissioners have exorbitant powers - there can be no appeal - The Ct may reject the return they make & appoint new Commissioners - but it is not done very frequently - The allowance of the Commissioners is fixed as it respects creditors, but not so as it respects the executor & admors. for they have but upon the debt so allowed may make any defence that might have been made by the testator or intestate - & they may appeal to the Superior Ct. & they decide the point if different.



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from the Comm<sup>rs</sup>. there must be a new average.

In Eng<sup>d</sup> if the Ex<sup>r</sup> has fully paid & is sued the plea is plene administr. But in Conn. an Ex<sup>r</sup> can now plead plene administr. to a Creditor. but he must plead specially that according to the average of the Probate he is to pay but \$1. on the pound, or whatever else the average may be. Except where the whole estate is exhausted in payment of funeral charges, public or sickness debts.

In Eng<sup>d</sup> there is no limitation as to the time debts must be brought in. In Conn. there is a time set by the Ct. of Probate for all Creditors to bring in their accounts, or else be barred of their debts. An average then can only be made among those who have come in. In new estate being discovered towards those Creditors who did not before come in, now may, & have their debts paid up to this average, which had been paid the Creditors who came in for the former average, if there be sufficient Estate discovered. The remainder shall be averaged among these & the former Creditors. If there now prove to be a residuum, it shall be distributed or disposed of in Legacies. But if any of those other Creditors or any of the Creditors have been at any expense in discovering the estate, their expenses shall first be deducted therefrom.

In Eng<sup>d</sup> the Ex<sup>r</sup> gives no bond. In Conn. he does in the same manner that an Adm<sup>r</sup> does. If he neglects to inventory an estate he is liable

## Exors & Adminors.

on his bond. If an Exor refuse to pay or administer on this new discovered estate, a suit must be laid on his bond given for a faithful discharge of his trust, & in the name of the Judges of Probate. all the new discovered property will be recovered out of the Exor or Adminor, & the Judges of Probate will hold it as Trustees for the Creditors. And for such refusal the Exor or Adminor may be disjoined & an Adminor de bonis non appointed to administer upon it.

In Court: a devastavit can never be a plea to Creditors - it may be pleaded by Legatees. Our average San is paid, the devastavit is always covered in the Bond - the suit is to be on the Bond, & judgment goes to him. Remember that the one who sues is allowed his reasonable expenses for carrying this the suit on the first instance.

For the same reason there cannot be an Exor de San lost where the Estate is insolvent. (This is a general rule wherever there is an average San.) He must be paid by the rightful Exor or Adminor as a trespasser, & the damages will be thus recovered on the judgment obtained to him, which ought to be averaged with the other assets. If there were an Exor of his own wrong, one Creditor might sue & recover his whole debt.

A difficulty has arisen in Court of the same one will happen wherever there is an average San with respect to what must be done with a voluntary Bond - the nature of it is that



## Errors & Admonors.

it is not a debt as to Creditors, but it is to be preferred to all volunteers, as *Seyalces* 8<sup>th</sup>. To put a case. The estate is representative insolvent - upon examination it is found that without the bond the estate w<sup>d</sup> be solvent - but by its admission the estate w<sup>d</sup> be rendered insolvent - therefore agreeably to the rule that Creditors must be preferred to volunteers, for the obligee of such bond is considered a volunteer, the Commissioners reject the bond. In such rejection the estate not only pays the debts, but there is a surplus, say £50. The bond is for £100. Now agreeably to the rule that the holder of a voluntary bond should be preferred to all other volunteers the obligee of the bond ought to come in & take the £50. in preference to any, *Seyalces* or next of kin - but a rejection of a debt by the Comm<sup>s</sup> totally destroys it, so that the debtee can have no demand in future, or any one. You see then that by striking him off, he is cut out from the residuum, to which above all others he is best entitled; if he is not struck off, Creditors loose their debts in part. Therefore it seems that the Ex<sup>r</sup> can proceed in this way without transgressing some one principle of Law. However Judge H. thinks this difficulty may be evaded by the Comm<sup>s</sup> in such cases taking an account of the bond, & carrying it into the Est. of Probate to stand as a *Seyalce* of the first rank - be first entitled to payment in a surplus.

## Executors and Administrators

### Miscellaneous. &c.

Where money is voluntarily paid into an Executor's hands he is not liable to interest except in case of mortgage money; and if he put it out to interest he is then liable therefor. Now if the money is not so lent and otherwise he is not liable for such loss. If however someone him to put out the money to interest he must, but if he accepts a safe and sound estate debt to pay in a debt, he is then liable to interest whether he put the money out to interest or not as there can never be payment of a debt out of an account of an estate by reason that he cannot be put himself thereby. 2. 100. 80.

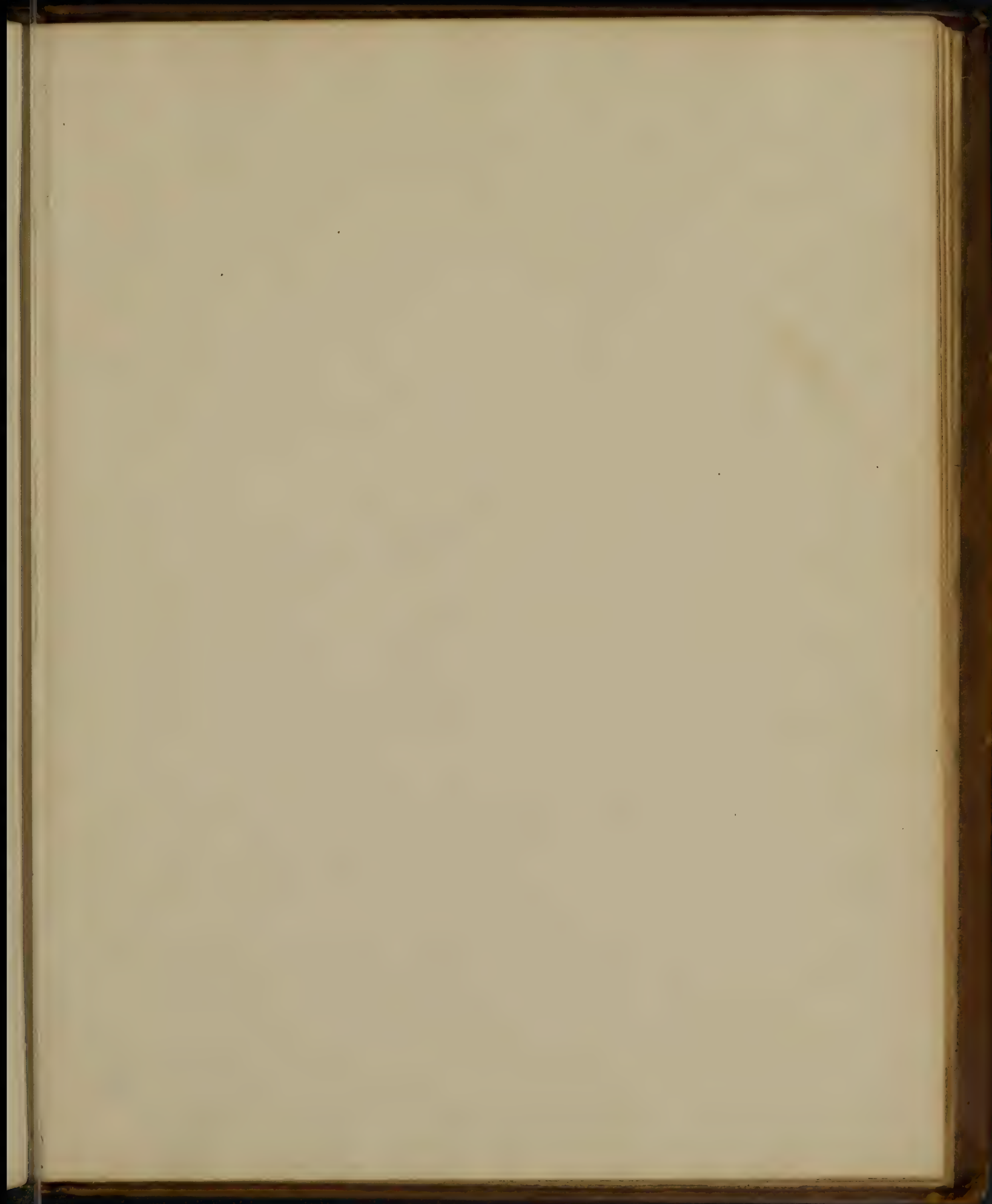
It is a principle of law that where one has paid to himself by legal assignment or has paid property as a security, he shall not be charged with a lien from him in favor of any other creditor. Now if one has so used his debt by a mortgage it shall not be subject to the mortgagee's claim on the same ground. It would seem that where a creditor has paid a debt of another property by way of security his debt shall not be subject to the creditor's claim. The general doctrine is contrary to this. Where would not the case be the same where money had been lent upon to secure the payment?

In the next of one of two cases the money is to be repaid by one of the creditors there but where the right of one only is to be repaid. In such a case the right of the creditor is being & it is the creditor's right to be repaid out of the money. In the next of two cases the money is to be repaid by one of the creditors there but where the right of one only is to be repaid. In such a case the right of the creditor is being & it is the creditor's right to be repaid out of the money. In the next of two cases the money is to be repaid by one of the creditors there but where the right of one only is to be repaid. In such a case the right of the creditor is being & it is the creditor's right to be repaid out of the money.

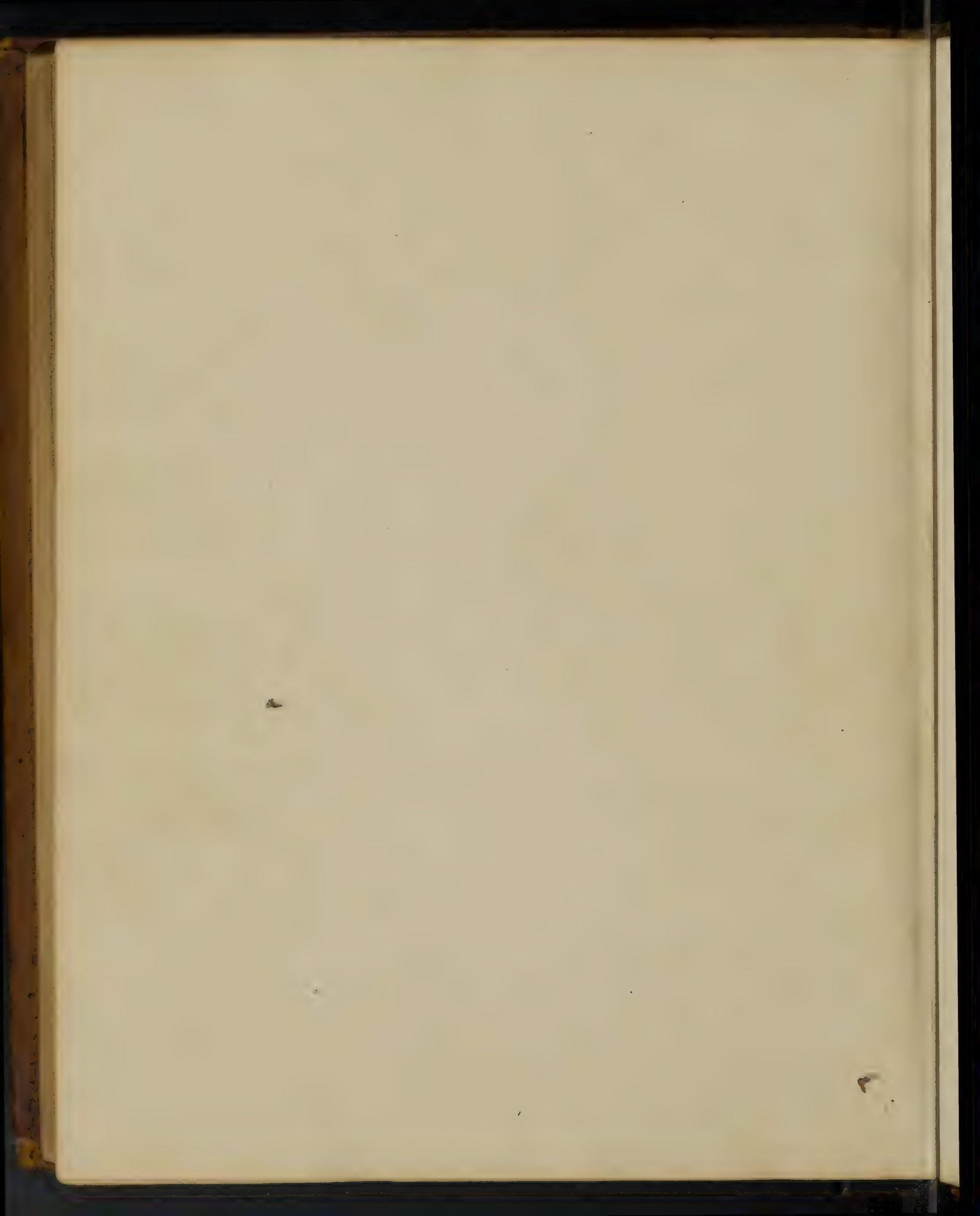


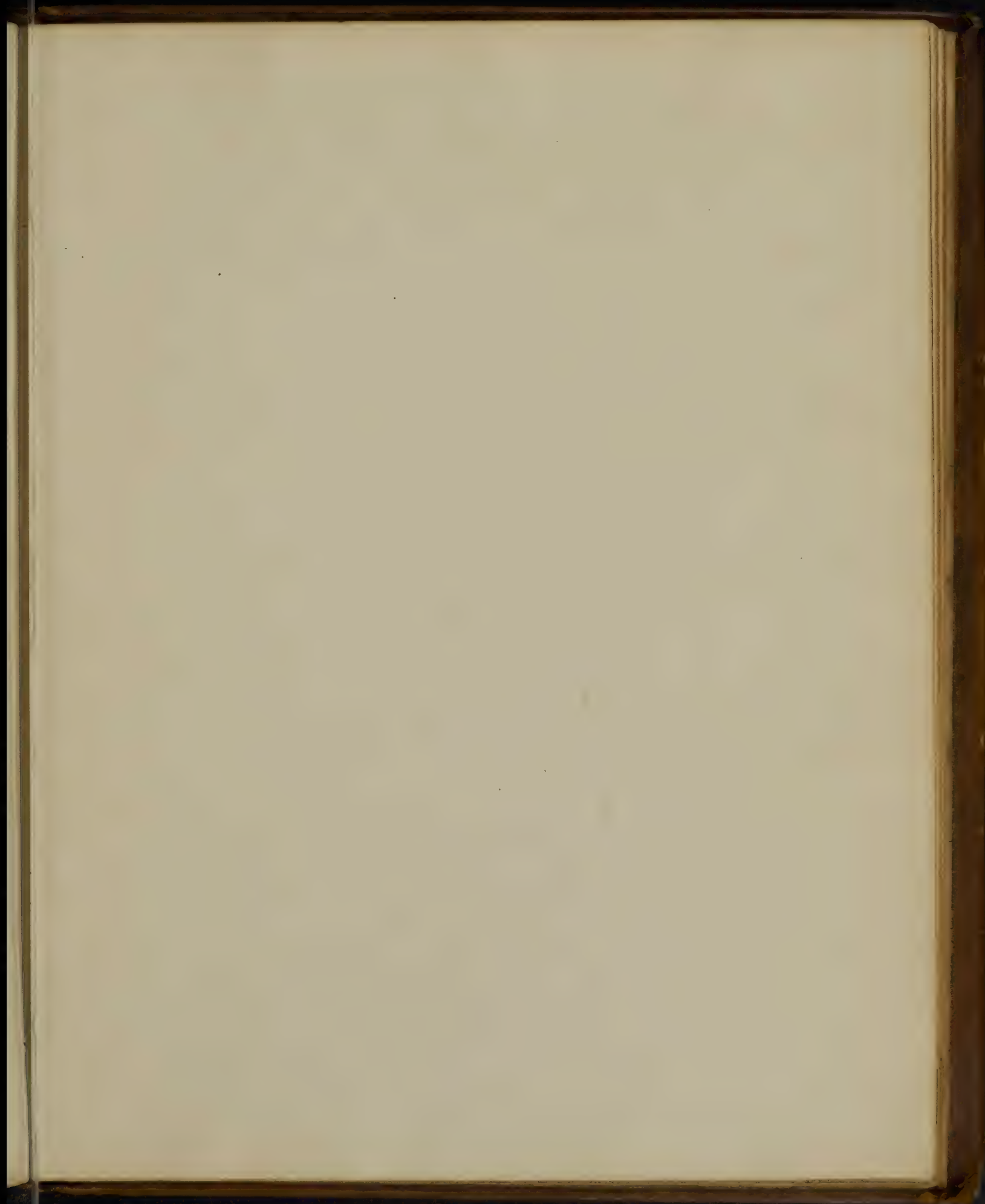
Executive and Administrative

a strong & the same course shall be taken in the same  
future cases. The whole parties are liable in the debt of the same way.  
but it is not on the better mode of remedy has been made by  
by doing a little in common and each has been the more in  
kind of doing the business that have now determined a common  
action shall be given. I hope the parties should improve to  
the so instant thing has entered my eye. create a strong feel  
strong. But I think that the same as other might be done as  
the same thing that has to do in the business use that such  
a proposition might not be so restricted. as I think being  
back of the existing and execution issued, the action is,  
which is the same the same of the last common parties  
can compel the debtor to make payment to him or as soon  
have appeared to circumvent the last common parties with  
power to do it.

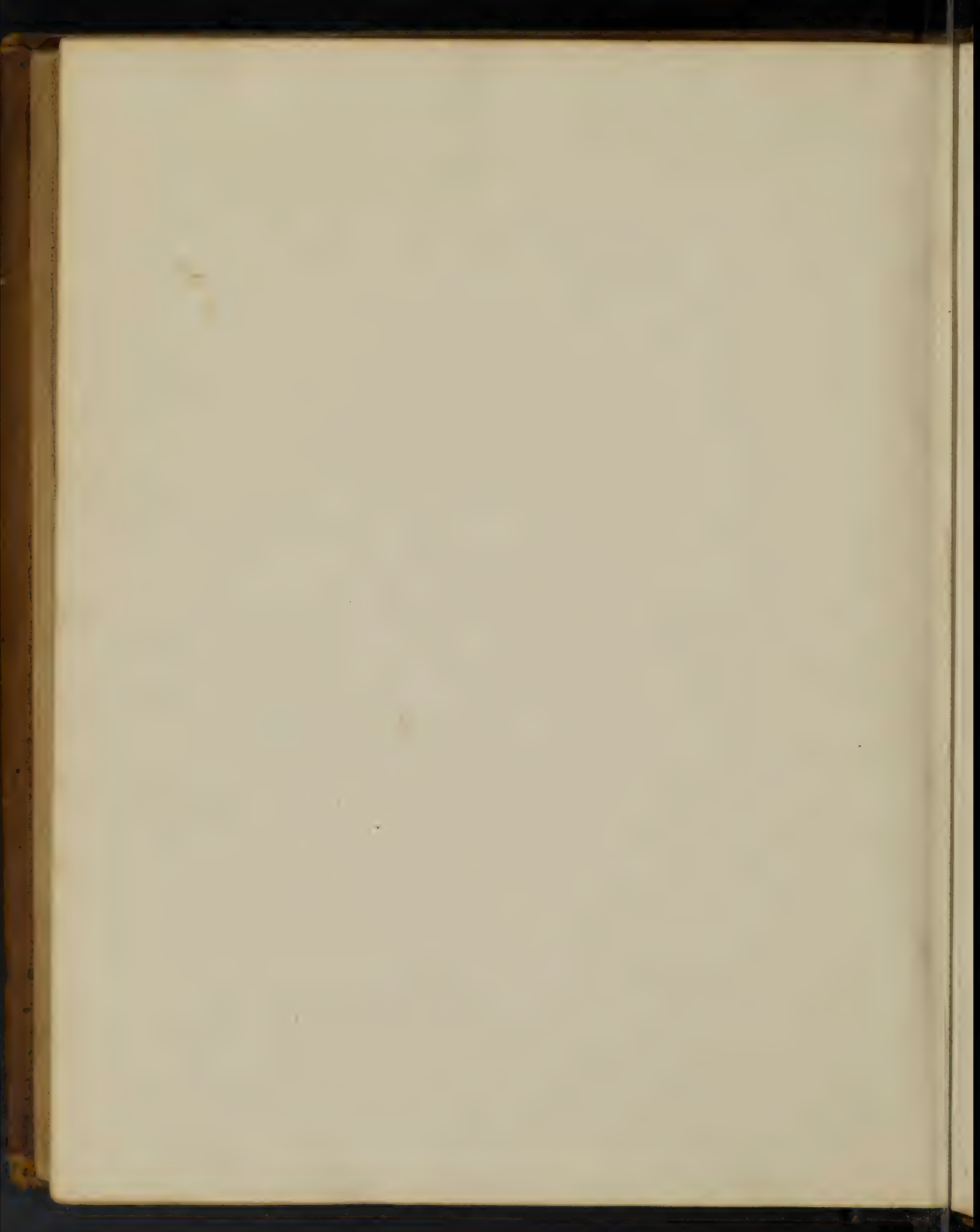


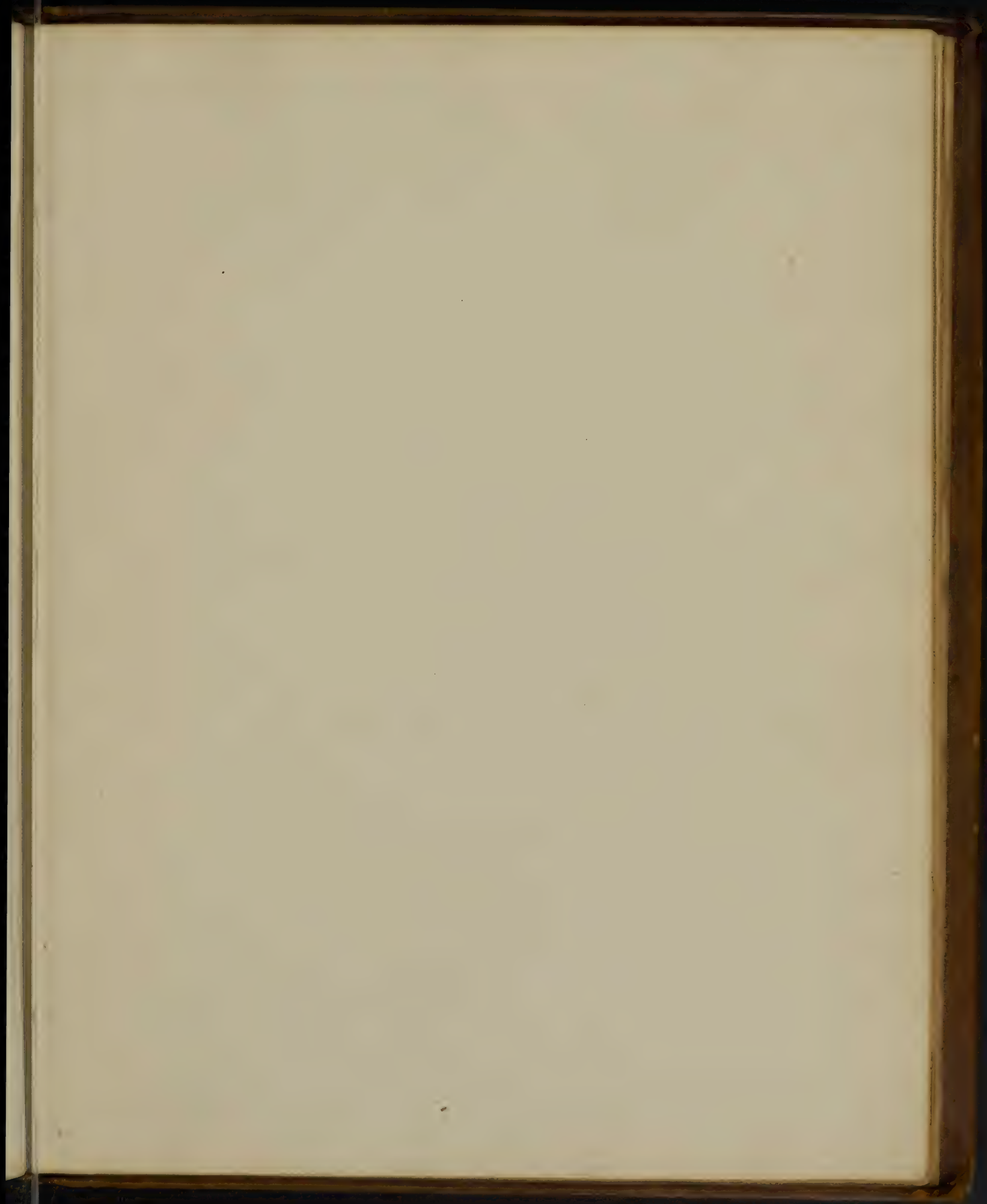




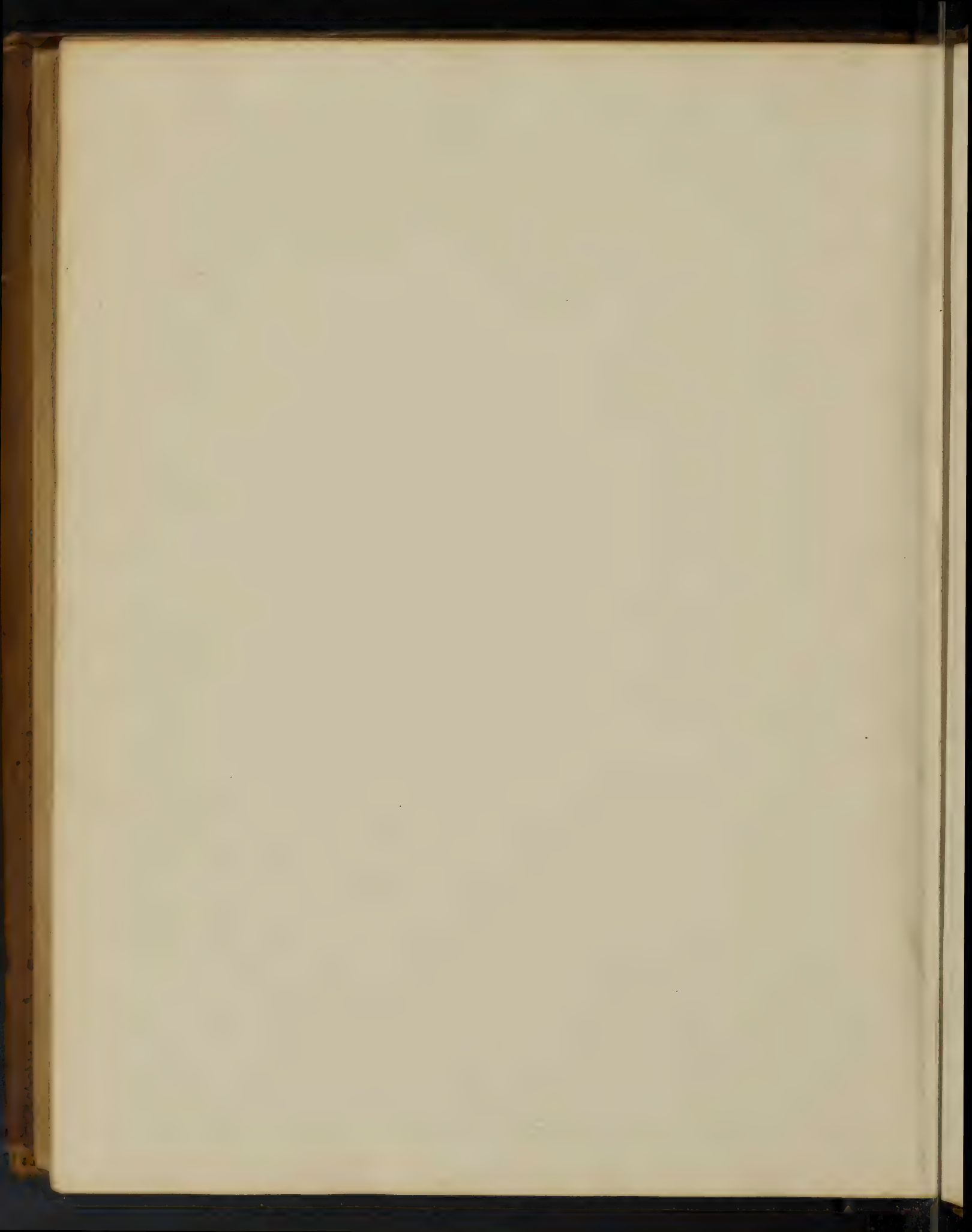


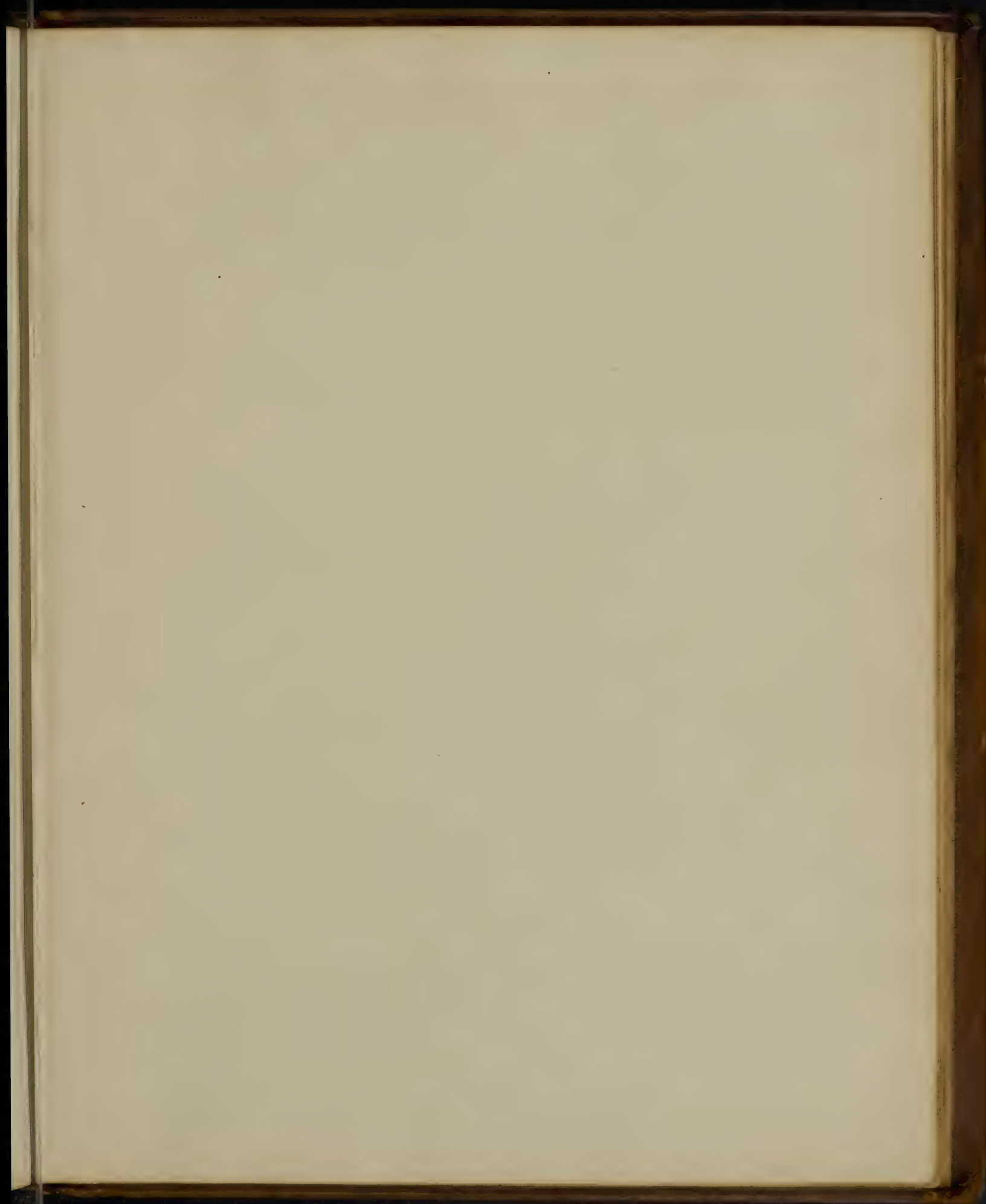




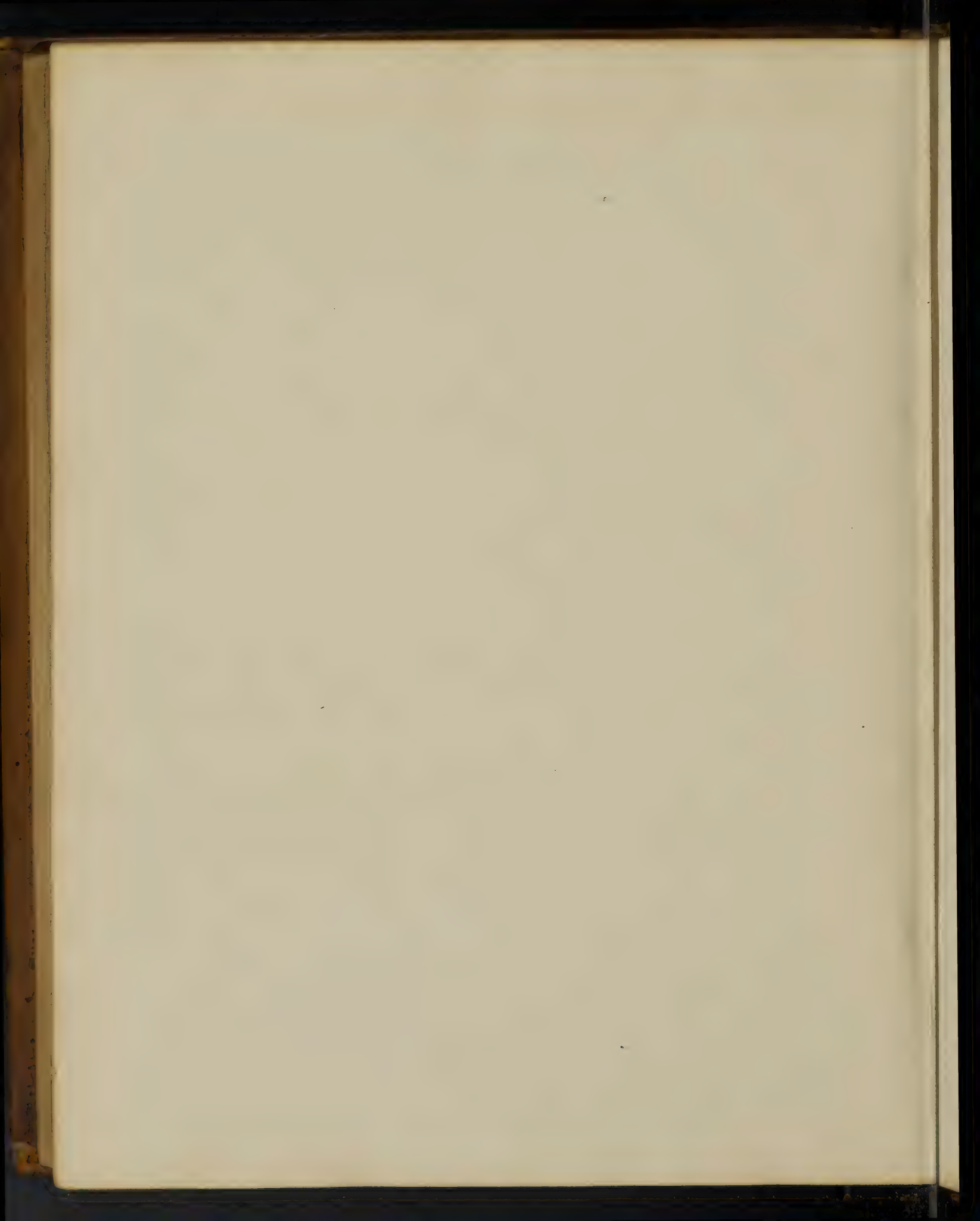


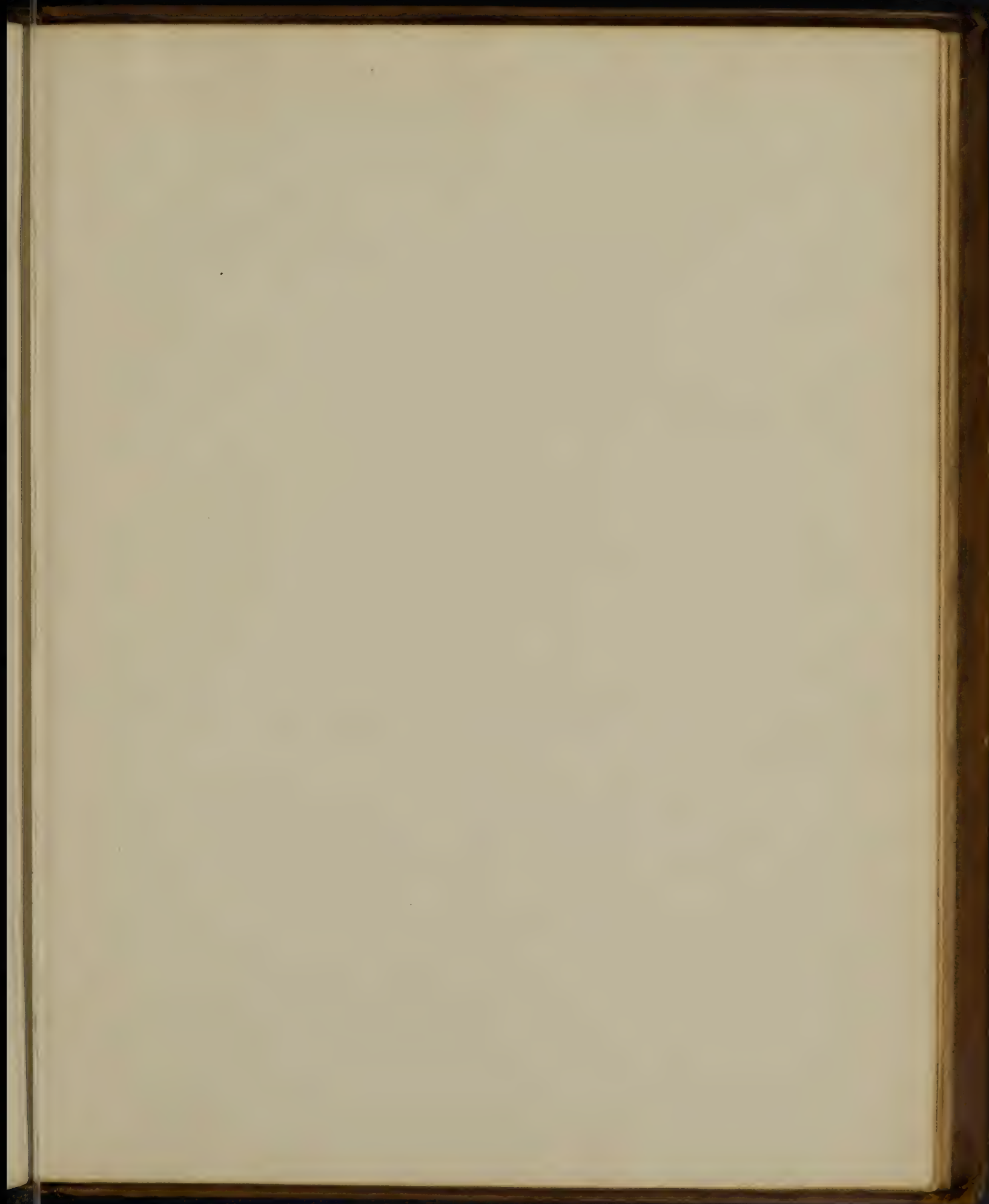




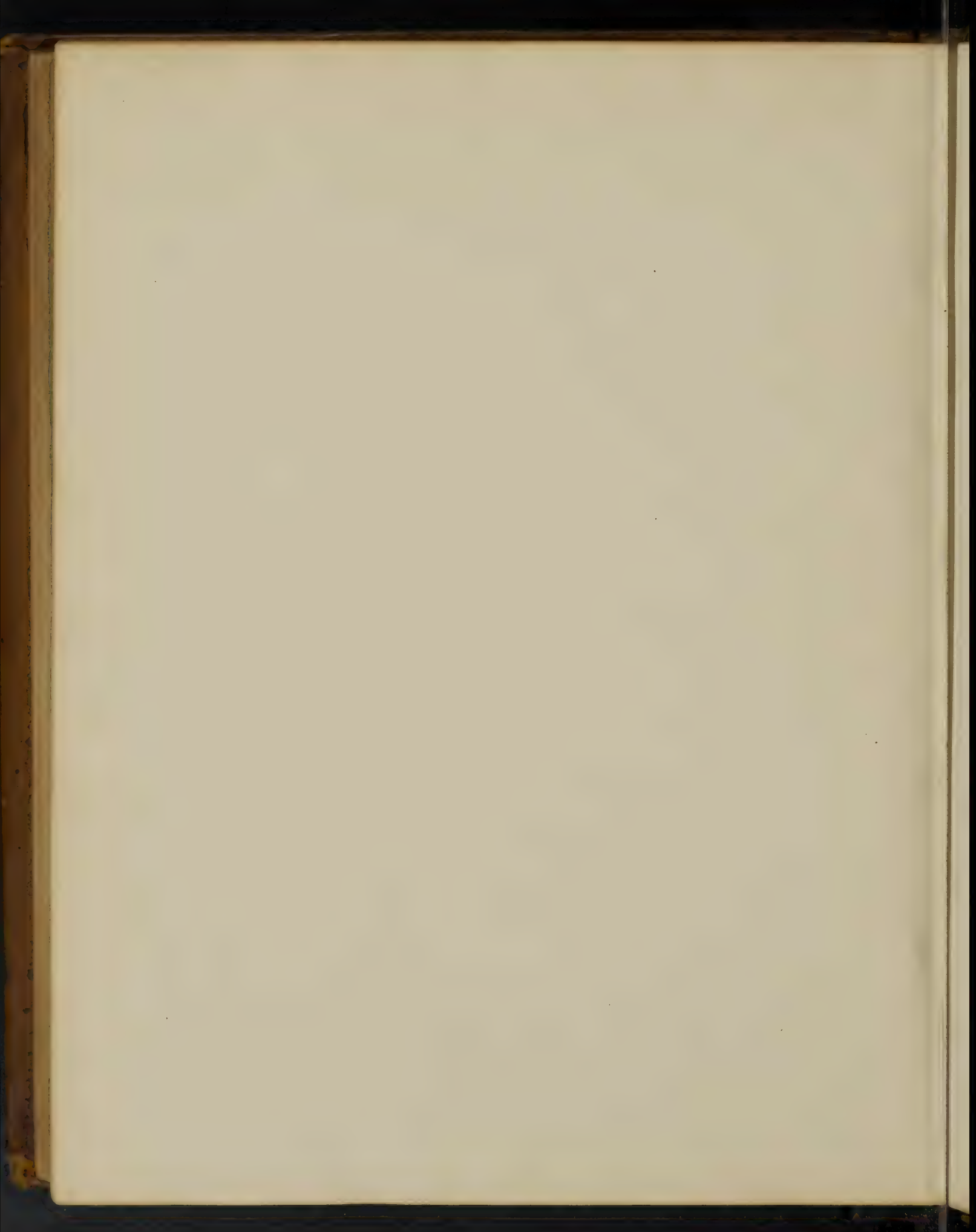


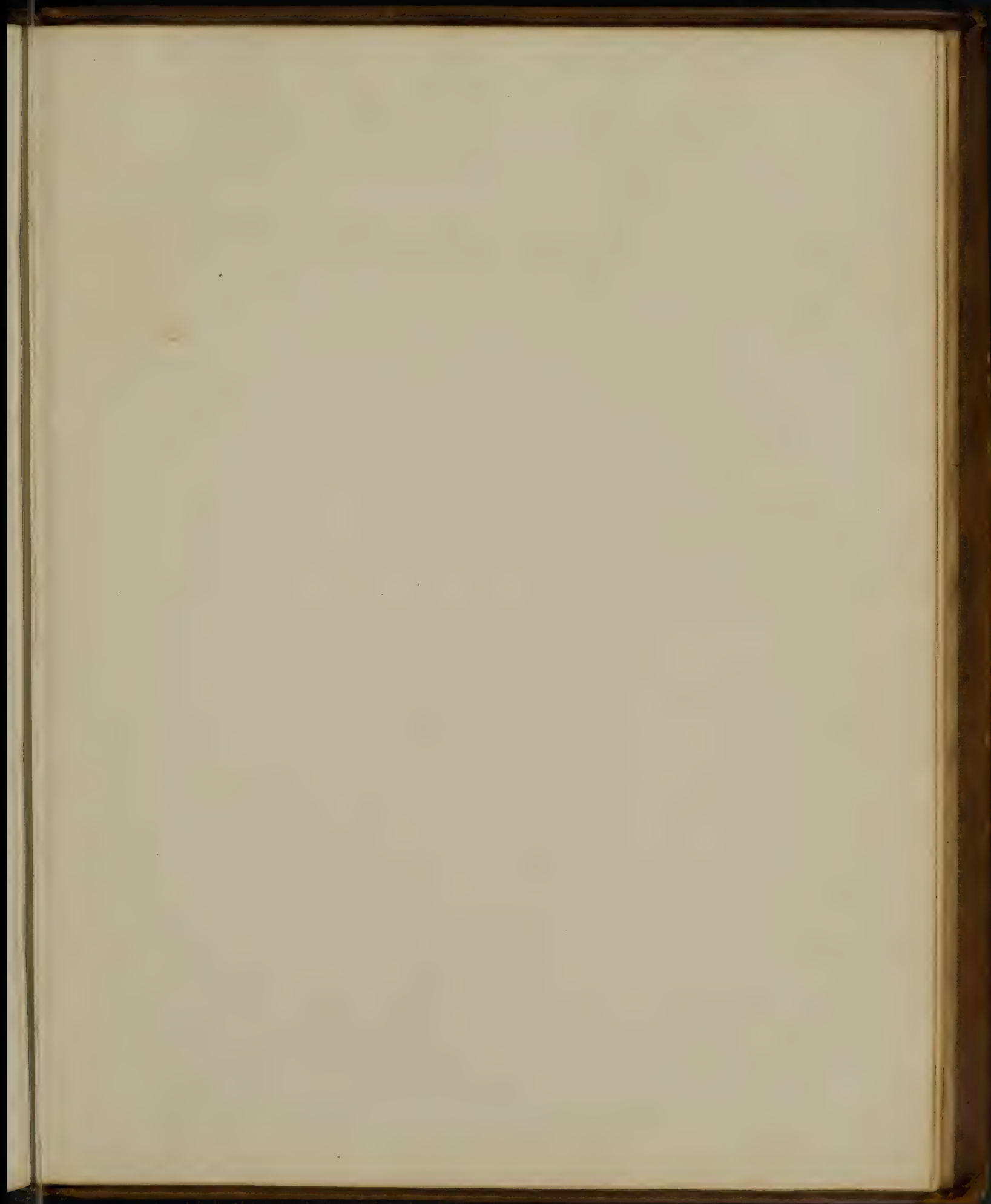




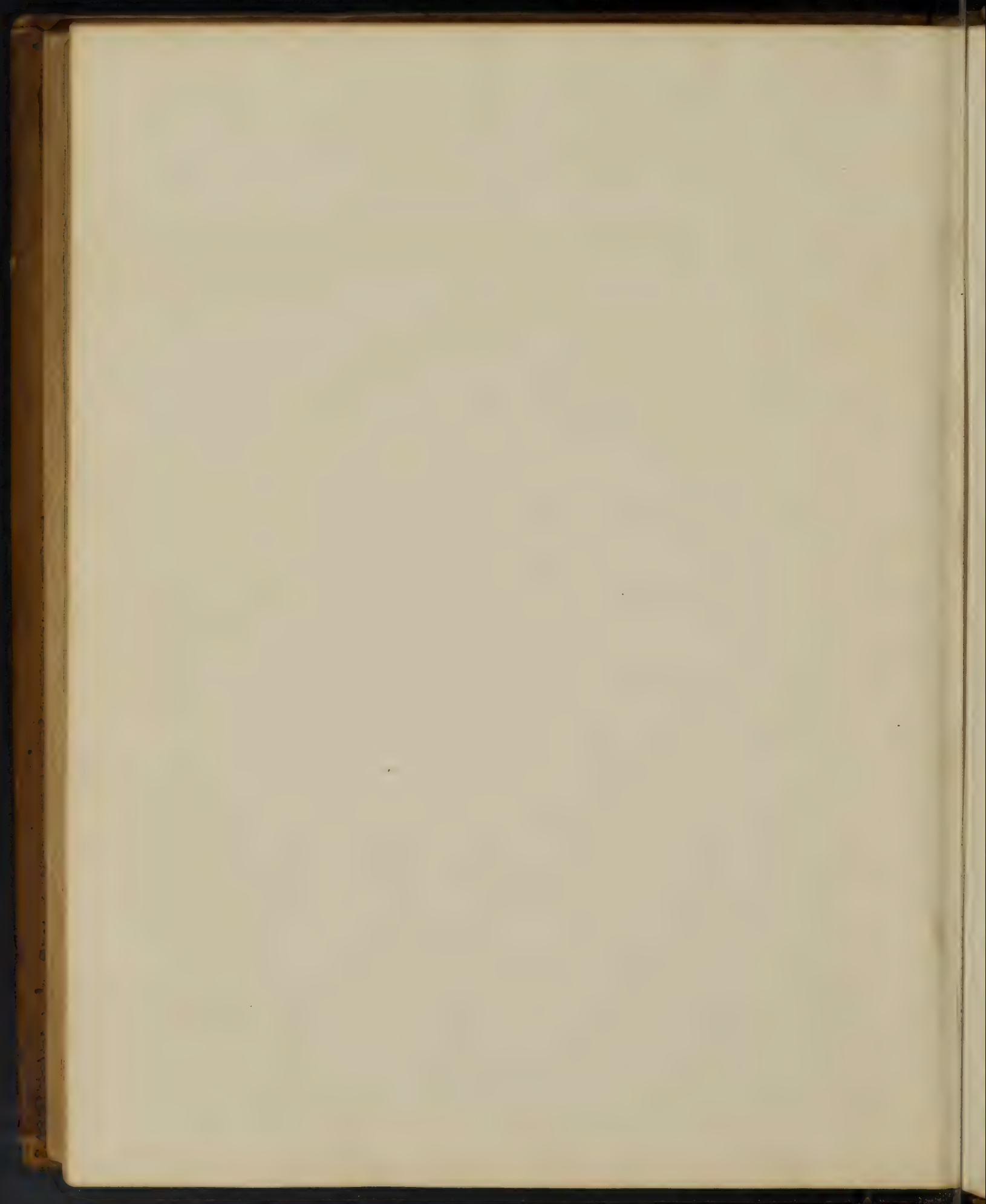


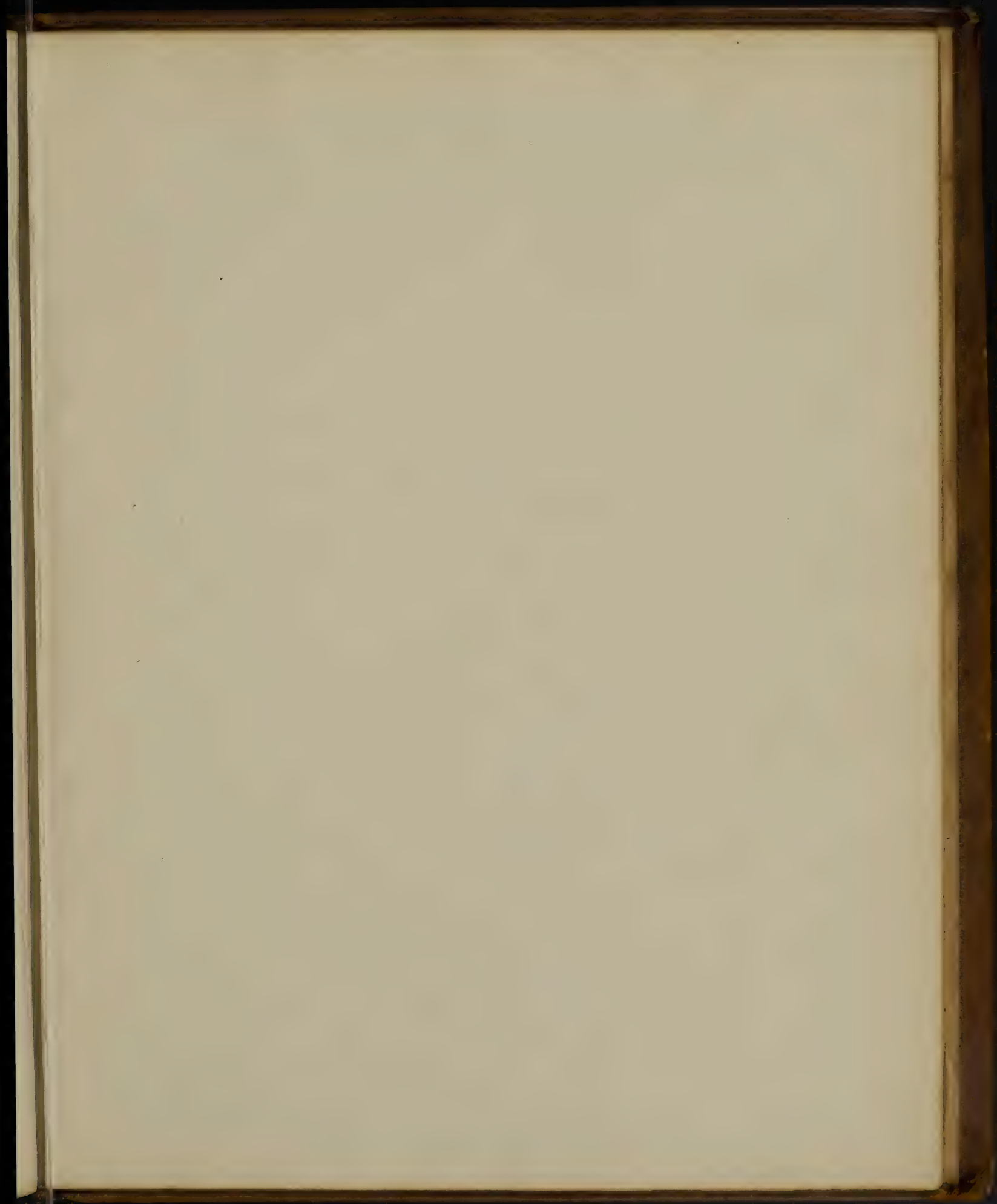






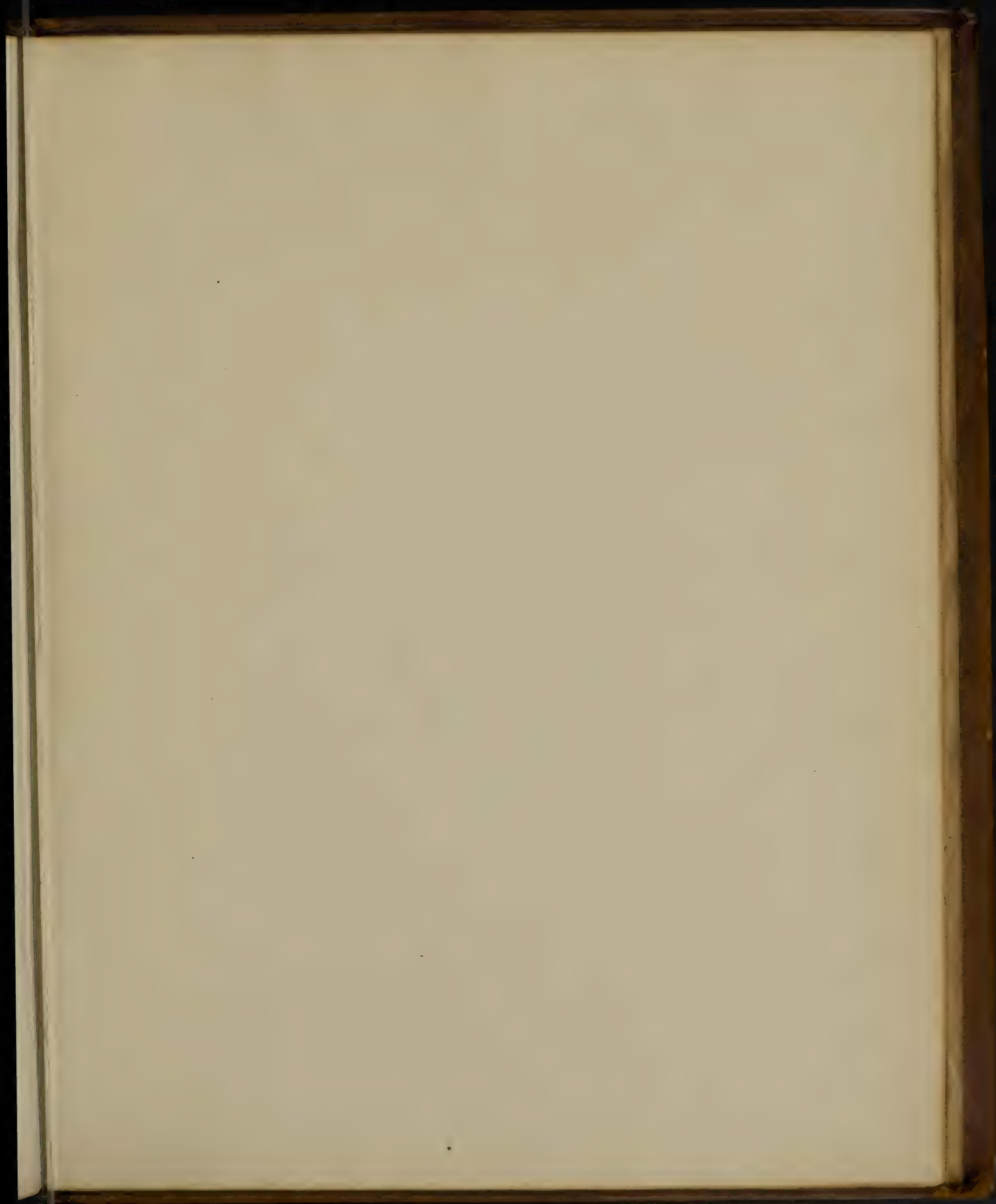






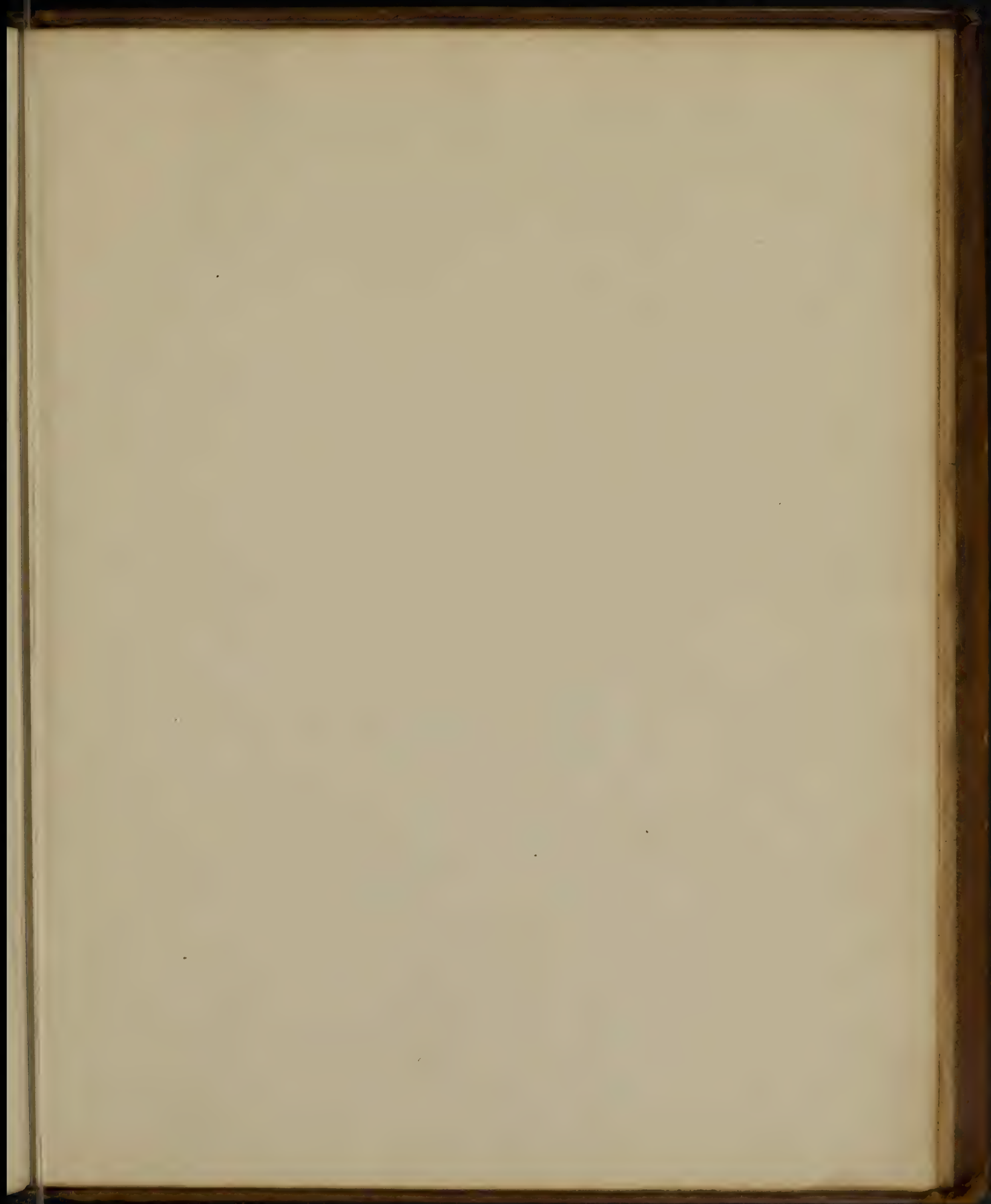




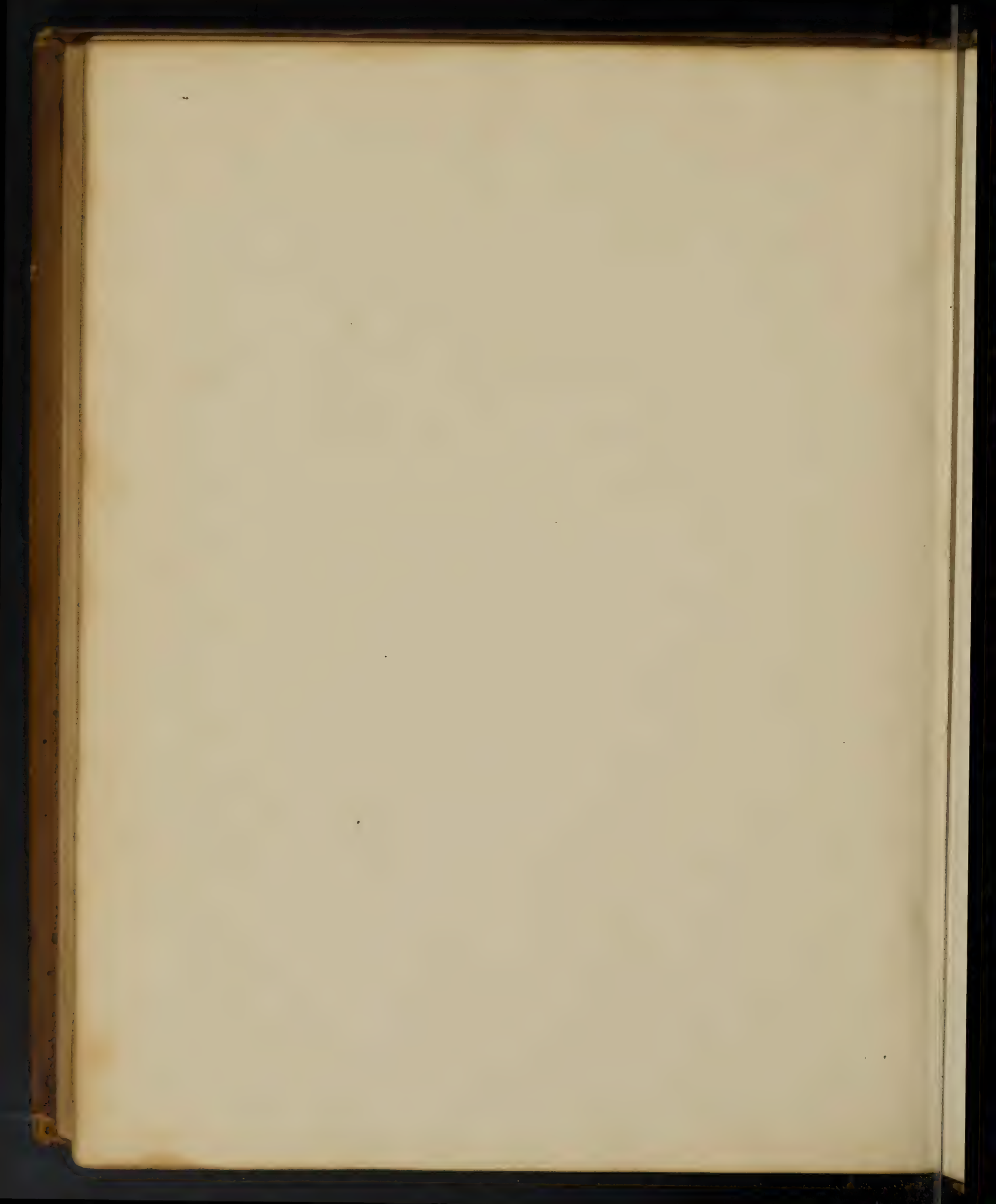


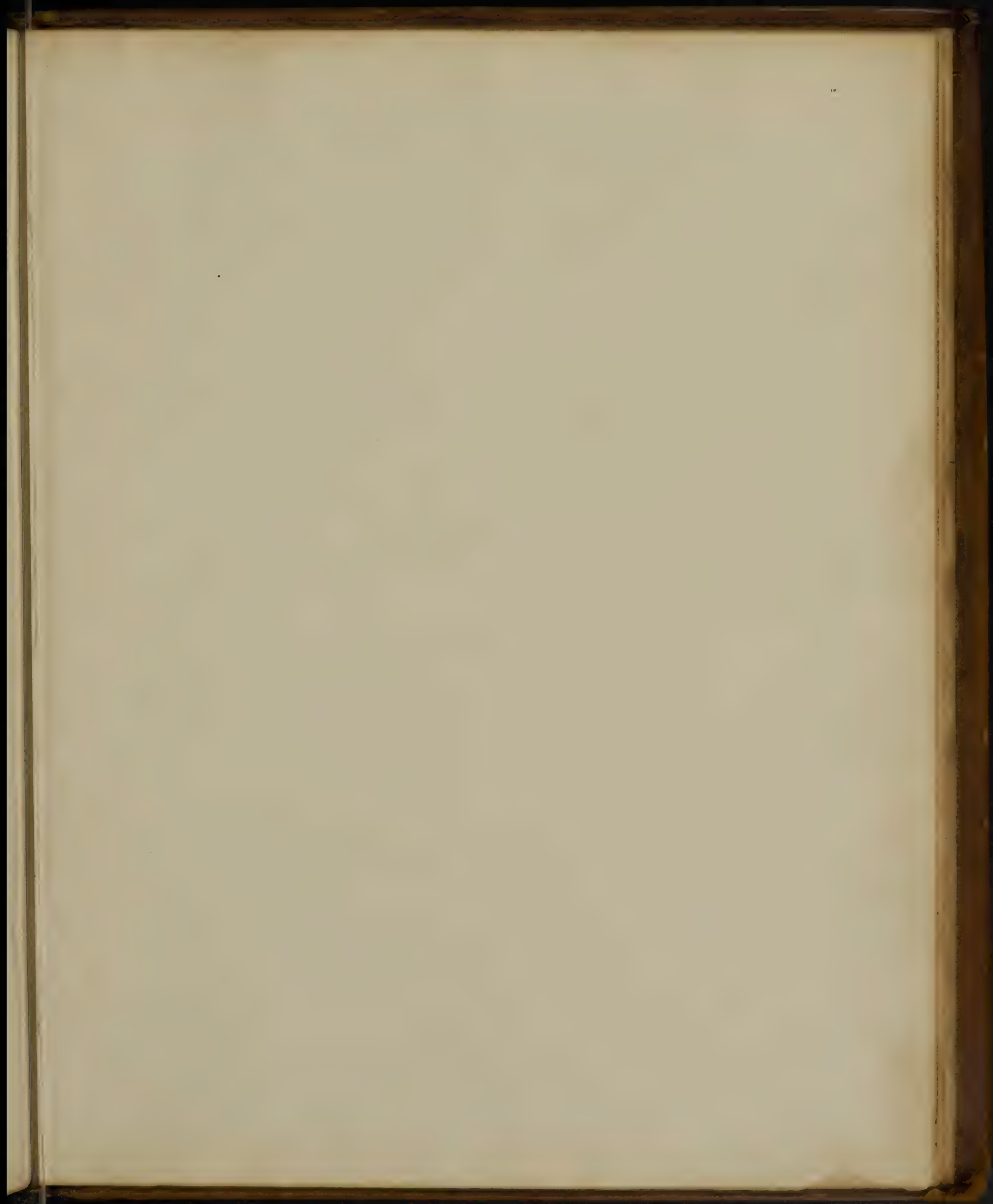




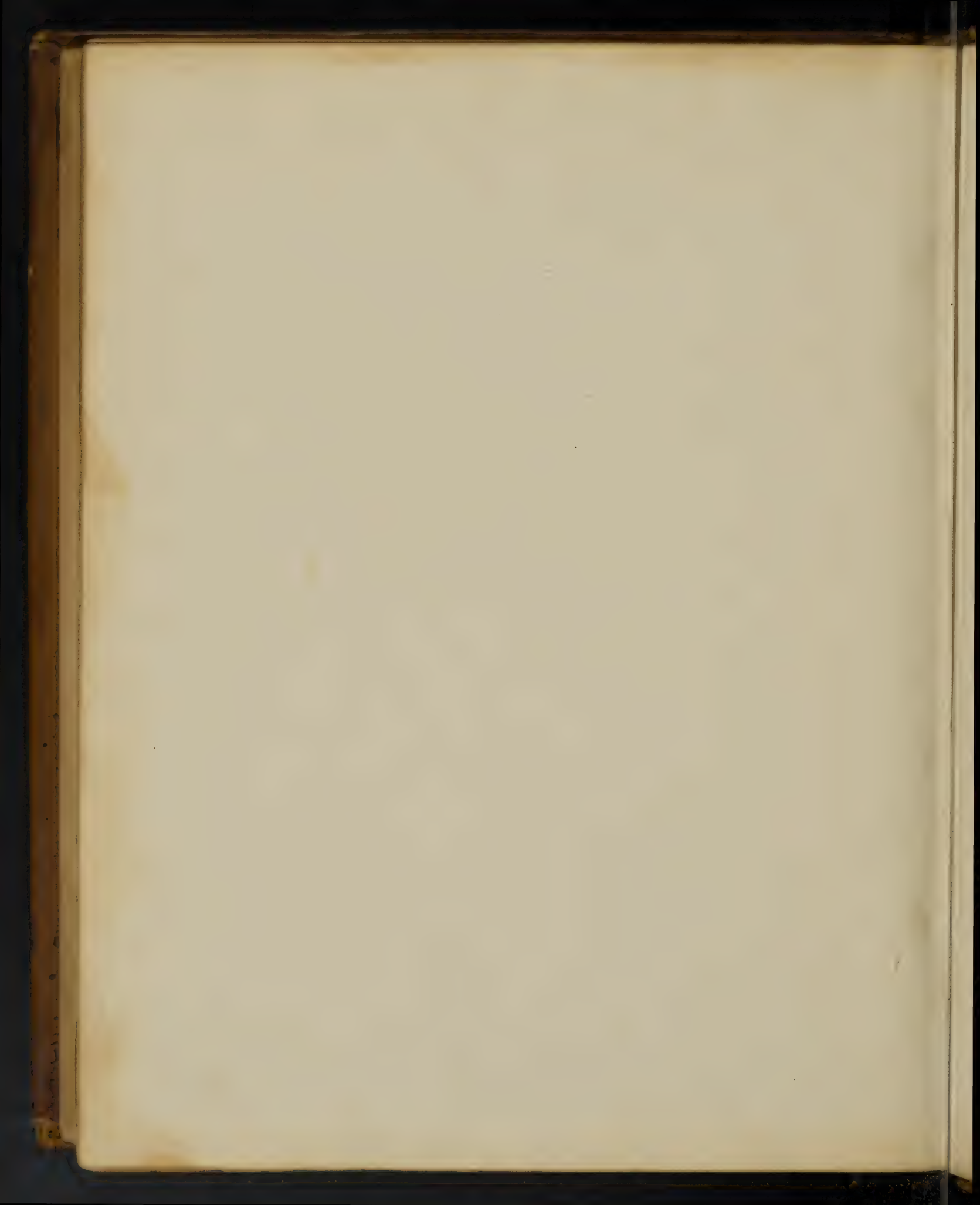


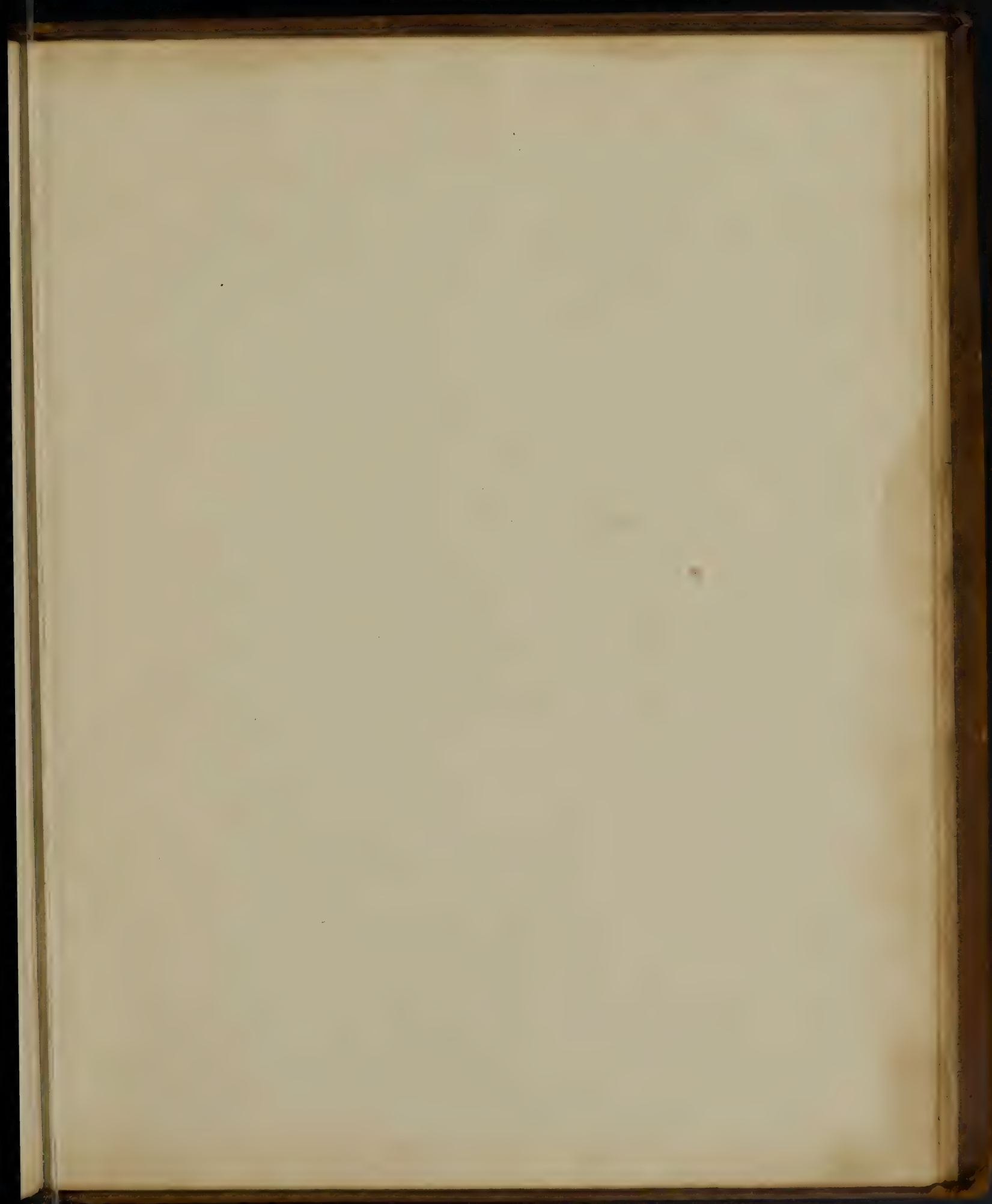




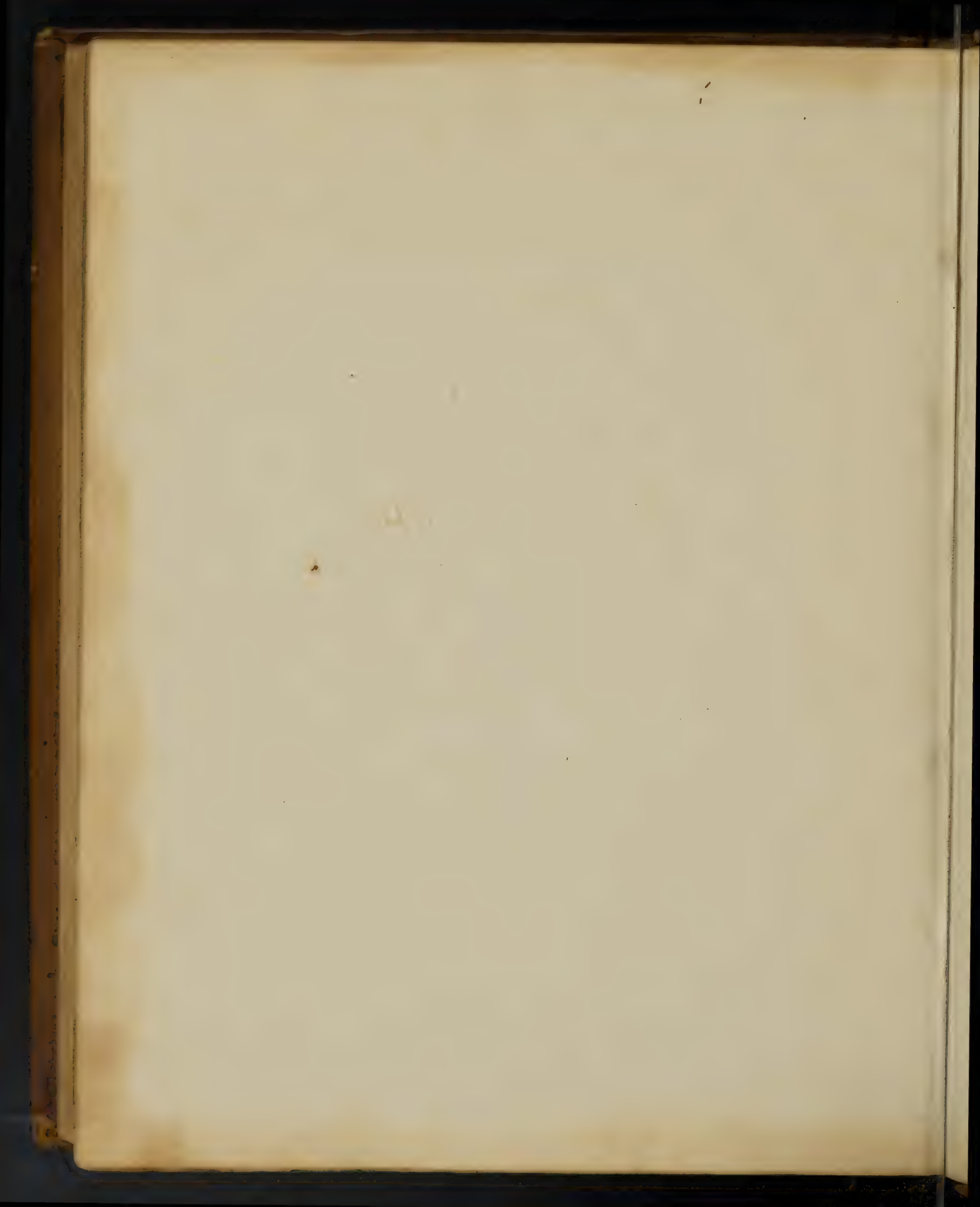


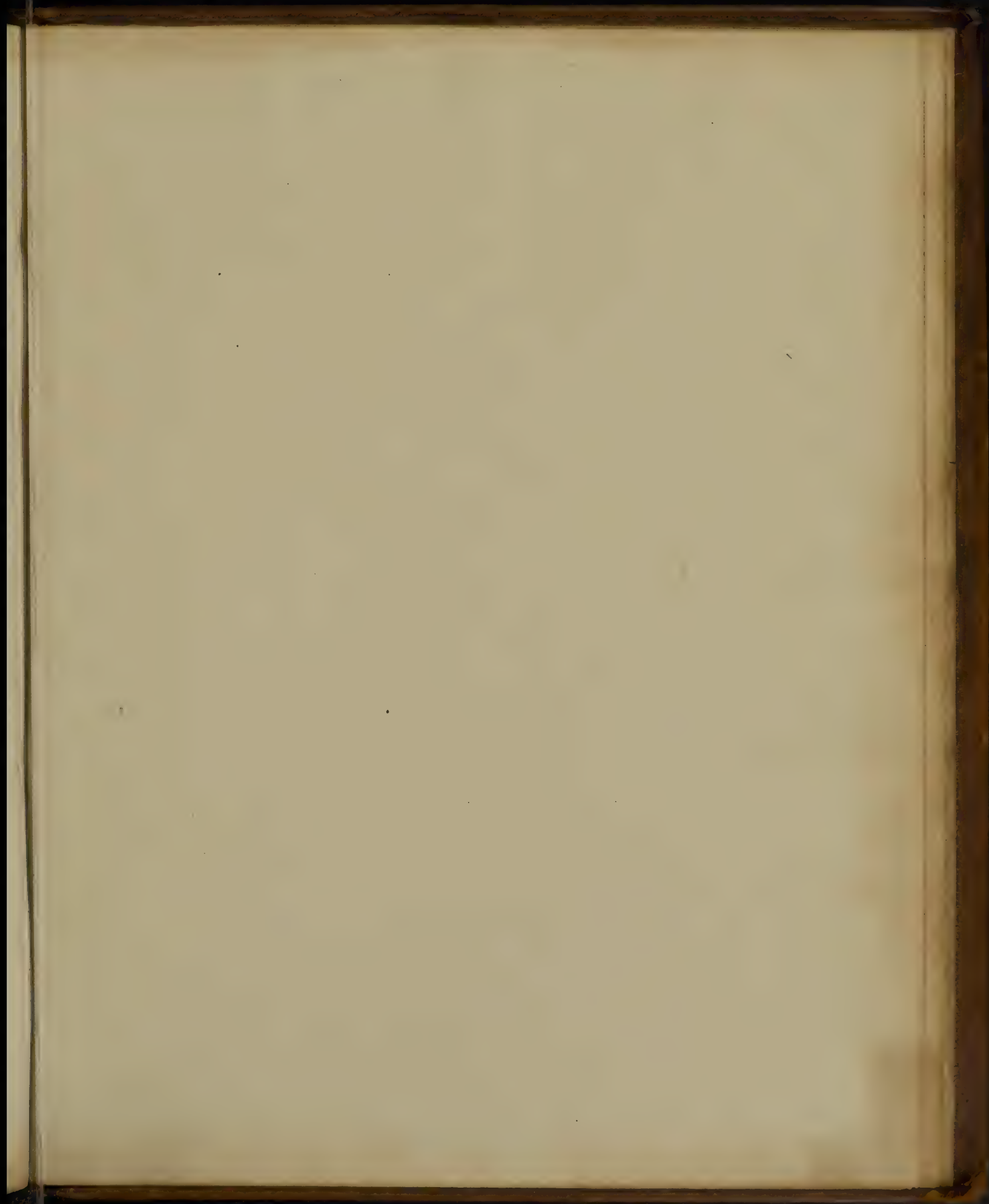




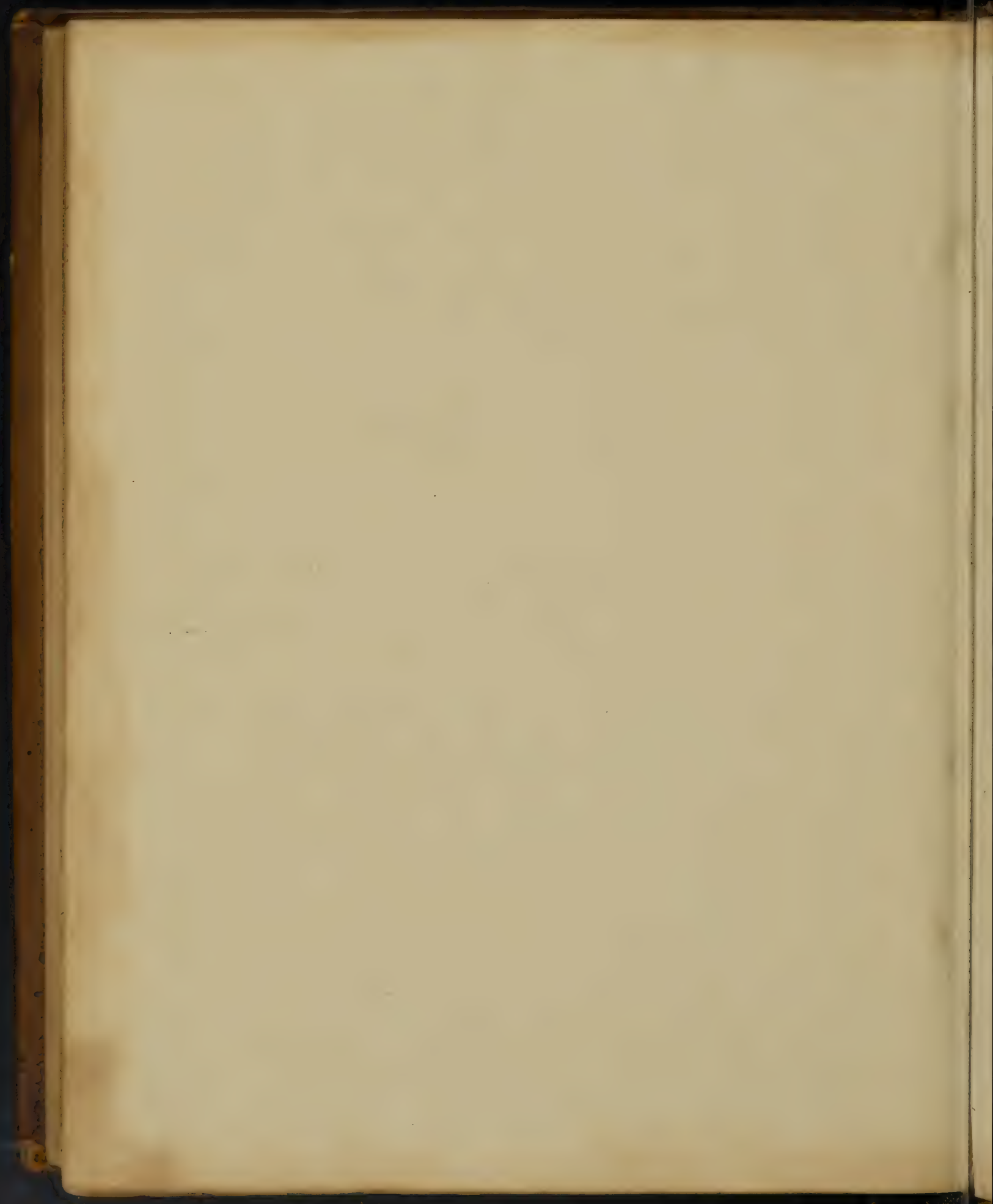


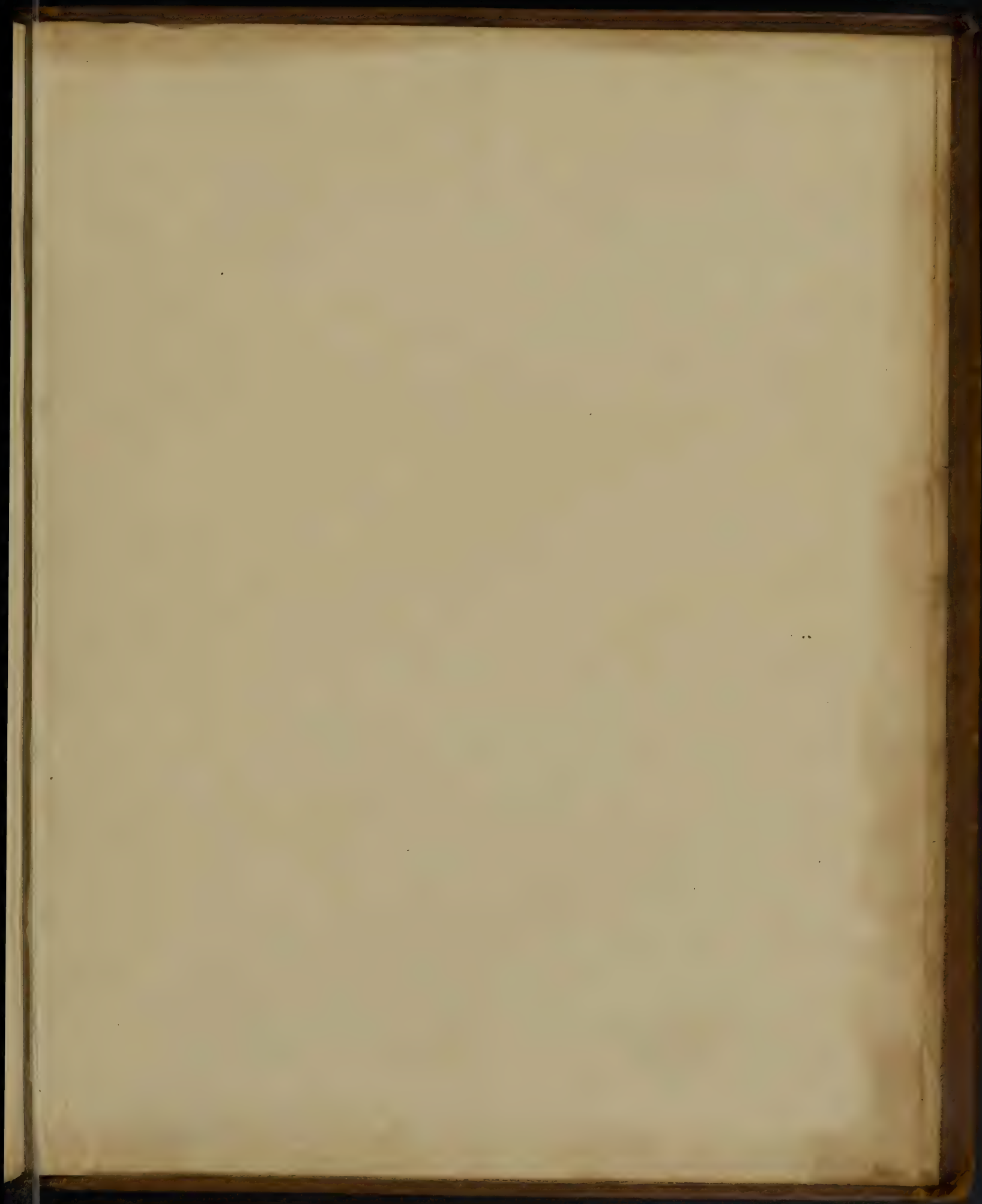




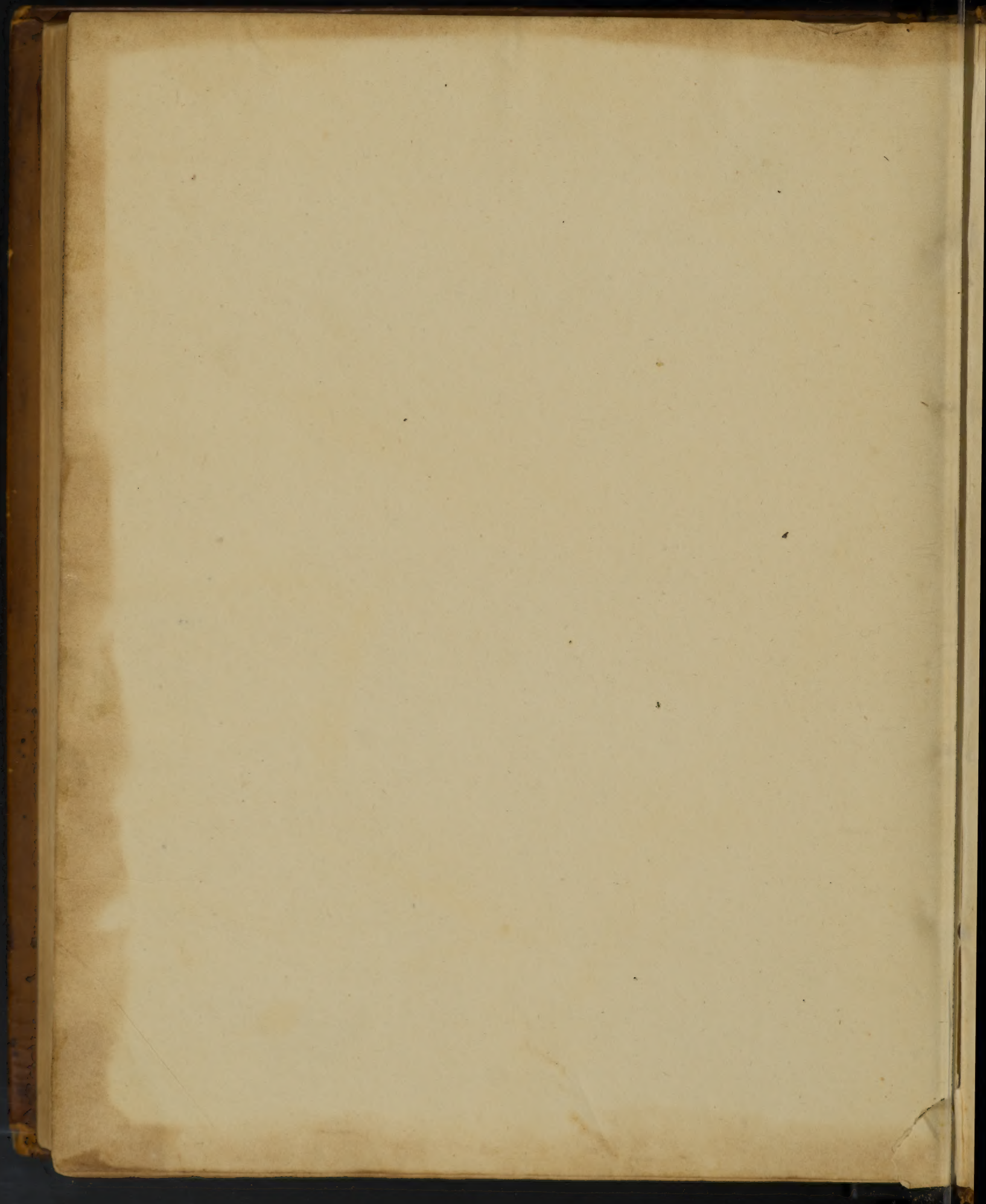








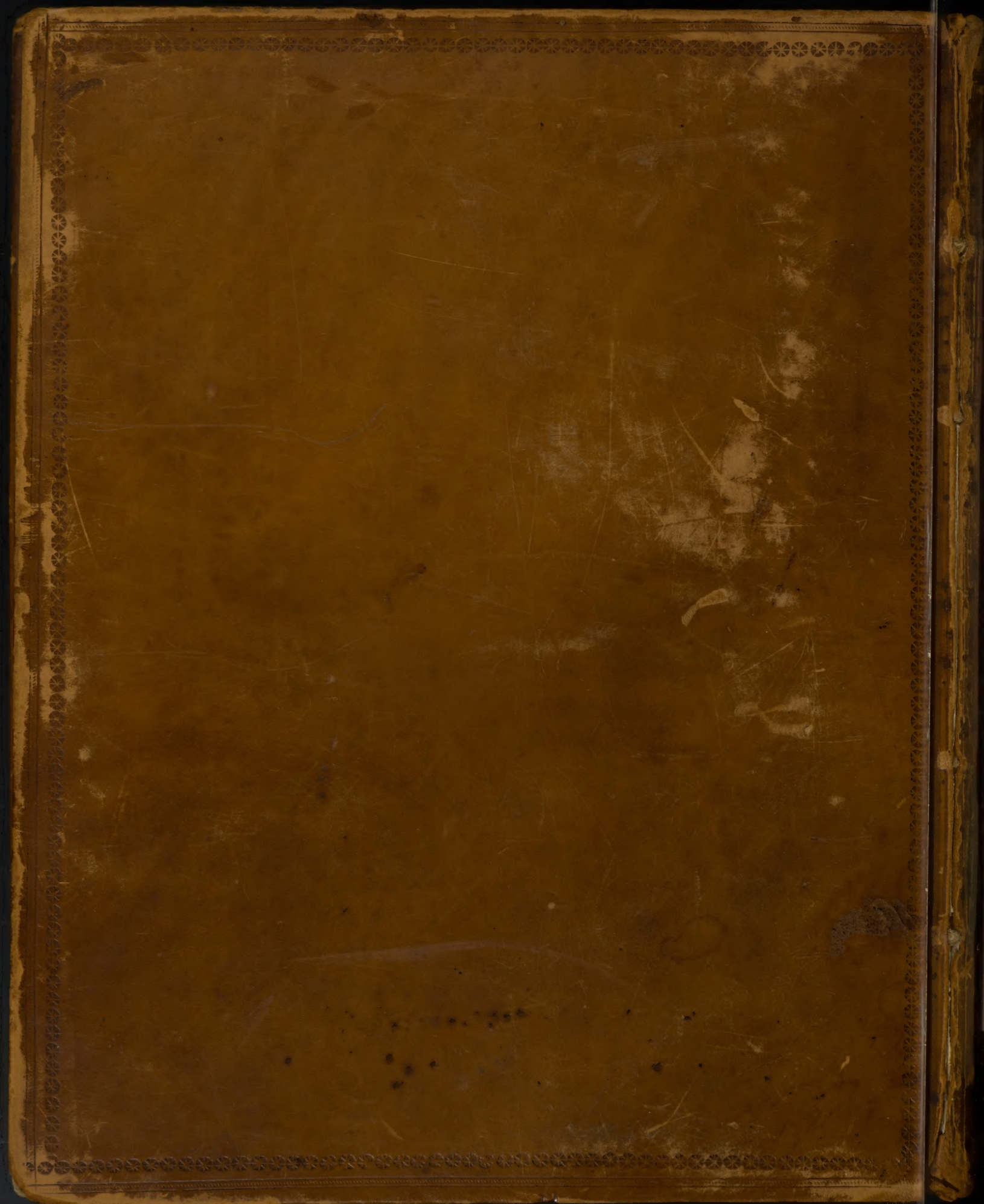






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